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No. 06-142

IN THE

Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI
a/k/a M. CHERIF BASSIOUNI,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *certiorari* should be granted to resolve the conflict that currently exists in no less than *seven* different circuits, in addition to an internal conflict within the Seventh Circuit itself, regarding the meaning of the "law enforcement activity" exception to subsection (e)(7) of the Privacy Act, 5 U.S.C. § 552a(e)(7) (2000), which prohibits the collection and maintenance of records describing the First Amendment activities of American citizens unless such collection and continued retention is "pertinent to and within the scope of an authorized law enforcement activity" concerning the requester?

2. Whether *certiorari* should be granted to resolve an important question of federal law concerning the Seventh Circuit's unprecedented violation of Rule 10(a) of the Federal Rules of Appellate Procedure where, in rendering its decision, the court reviewed *ex parte* a classified FBI declaration that was never filed in the district court, considered by the district court judge, or made part of the record on appeal, and that was submitted by the FBI for the first time after oral argument in the court of appeals?

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Mahmoud Cherif Bassiouni a/k/a M. Cherif Bassiouni, Petitioner, respectfully petitions this Court for a writ of *certiorari* to review the erroneous opinion of the United States Court of Appeals for the Seventh Circuit, Case No. 04-3888, dated January 30, 2006.

OPINIONS BELOW

On January 30, 2006, the United States Court of Appeals for the Seventh Circuit issued its opinion (published at 436 F.3d 712) (Pet. App. at 1a) affirming the district court's ruling (published at 2004 U.S. Dist. LEXIS 18515) (Pet. App. at 30a). The United States Court of Appeals for the Seventh Circuit denied Petitioner's request for rehearing *en banc* on April 27, 2006 (published at 2006 U.S. App. LEXIS 10807) (Pet. App. at 42a).

JURISDICTION

The judgment appealed from was entered by the Seventh Circuit on January 30, 2006. Petitioner's request for rehearing was denied on April 27, 2006. The *certiorari* jurisdiction of this Court is invoked in conformity with 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The First Amendment to the United States Constitution declares, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 552a(e)(7) of the federal Privacy Act

provides, in pertinent part, that "[e]ach agency that maintains a system of records shall – maintain no record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7) (2000).

STATEMENT OF THE CASE

By letter dated November 22, 1999, M. Cherif Bassiouni, who is a world-renowned law professor specializing in international criminal and human rights law, as well as a previous Nobel Peace Prize candidate, wrote to the Federal Bureau of Investigation (FBI) seeking access to records in the agency's possession concerning himself under the Freedom of Information Act and the Privacy Act (PA or Act). By letter dated March 23, 2001, the FBI released 49 pages of records, with redactions, which included a transmittal cover letter, five memoranda dating from the 1970s, and appendices. The parties agree that the records in Bassiouni's file directly or indirectly describe his First Amendment activities.

For example, the records in Bassiouni's FBI file contain references to and general descriptions of numerous organizations, a number of which are described as "terrorist" in nature, and one of which is currently named on the United States Department of State's List of Designated Foreign Terrorist Organizations. These groups include: (1) the Popular Front for the Liberation of Palestine; (2) Al Fatah; (3) the Palestine Liberation Organization; (4) the Organization of Arab Students; and (5) the United Holy Land Fund. None of these descriptions, however, makes any reference to Bassiouni. In addition, other records in the file

include the memorialization of a letter sent by Bassiouni to prominent Arab-Americans urging them to exert their influence to prevent violence in the Arab community, the text of a telegram sent by Bassiouni on the subject of the Palestinian Question, and remarks allegedly made by Bassiouni as the master of ceremonies regarding the American press and the conduct of government agencies, such as the FBI, toward Arabs.

The file further indicates that, in 1975, after conducting an investigation, the FBI concluded that Bassiouni "was not a member of any terrorist organization." Furthermore, none of the records states FBI conclusions that Bassiouni is or was a member of any of the referenced organizations, and Bassiouni denies any such membership. The FBI admits that it does not suspect Bassiouni of ties to terrorist groups and that he is not currently under investigation. The file in which these records are retained is retrievable under Bassiouni's name.

By letter dated April 23, 2001, Bassiouni wrote to the FBI seeking amendment of such records on the grounds that, *inter alia*, they described the exercise of his First Amendment activities. After fully exhausting his administrative remedies, Bassiouni filed a complaint for declaratory and injunctive relief pursuant to the PA, 5 U.S.C. § 552a (2000). In the complaint, Bassiouni requested amendment and expungement, contending that the continued maintenance of such prejudicial records in his personal file violated the PA. The district court denied the FBI's motion to dismiss. *See Bassiouni v. FBI*, No. 02 C 8918, 2003 U.S. Dist. LEXIS 17136 (N.D. Ill. Sept. 26, 2003). In support of its motion for summary judgment, the FBI submitted a public declaration of Supervisory Special Agent (SSA) James M. Krupkowski,

in which he stated that despite the agency's 1975 conclusion that "Mr. Bassiouni himself was not a member of any terrorist organization," it was likely that the FBI "will continue to receive information regarding Mr. Bassiouni" in the future. After both parties filed cross-motions for summary judgment, the district court entered judgment for the FBI. (Pet. App. at 41a).

At oral argument on June 9, 2005, counsel for the FBI repeatedly asked the panel to consider *ex parte* a classified declaration of SSA Krupkowski, although such declaration was never considered by the district court judge in making her ruling and was not contained in the record on appeal. Bassiouni's counsel objected at oral argument to the Court considering the classified declaration, as well as in a motion asking the Court to reconsider its subsequent directive ordering that the FBI produce the classified declaration for the first time on appeal.

On January 30, 2006, the Court of Appeals for the Seventh Circuit affirmed the decision of the district court, holding that it was not required to reach Bassiouni's request for expungement under subsection (e)(7) of the Act because, without "determin[ing] the precise limits of the term 'law enforcement activity,'" the Court "believe[s] that the purposes identified by the Bureau fall within 'authorized law enforcement activity' conducted by the FBI." (Pet. App. at 26a) More specifically, in light of the FBI's assertion that it amended its investigative priorities since September 11, 2001, to fighting terrorism, the Court opined: "We believe that Congress anticipated that, in the fulfillment of its responsibilities an agency must maintain information that it can reasonably demonstrate will be pertinent in its efforts to evaluate the significance of future situations." (Pet. App. at

28a) The Court also rejected Bassiouni's assertion that the maintenance of such records in a name-retrievable file, as opposed to a general subject file, was prohibited. (Pet. App. at 28a) Finally, the Court confirmed that it considered the FBI's classified declaration *in camera* in rendering its decision. (Pet. App. at 20a - 23a)

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted To Resolve The Conflict That Currently Exists In No Less Than *Seven* Different Circuits, In Addition To An Internal Conflict Within The Seventh Circuit Itself, Regarding The Meaning Of The "Law Enforcement Activity" Exception To Subsection (e)(7) Of The Privacy Act, 5 U.S.C. § 552a(e)(7) (2000), Which Prohibits The Collection And Maintenance Of Records Describing The First Amendment Activities Of American Citizens Unless Such Collection And Continued Retention Is "Pertinent To And Within The Scope Of An Authorized Law Enforcement Activity" Concerning The Requester.

> "[The Privacy Act] is [designed] to prevent the secret gathering of information on people or the creation of secret information systems or data banks on Americans by employees of the departments and agencies of the executive branch."
>
> – S. REP. No. 93-1183, at 2 (1974).

The time is ripe for this Court to resolve the utter chaos that reigns in the circuit courts regarding the meaning of the "law enforcement activity" exception to 5 U.S.C. § 552a(e)(7) of the Privacy Act (PA or Act). Each of the seven circuit

courts that has thus far addressed this provision has created its own standard for assessing the scope of the exception, and, with the advent of the instant case, there now exists an internal conflict in the Seventh Circuit, as well. The federal PA is now more than 30 years' old, and this Court has yet to decide a case defining the parameters of subsection (e)(7), arguably the most important provision of the entire Act. Serious guidance is needed to resolve the irreconcilable conflict that currently exists among and within the circuits.

Section 552a(e)(7) of the PA provides, in pertinent part: "Each agency that maintains a system of records shall– . . . maintain no record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7) (2000). Subsection (e)(7) was aimed particularly at preventing the collection and maintenance of "protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." S. REP. No. 93-1183, at 57 (1974). An analysis of subsection (e)(7) involves a determination of: (1) whether the records at issue describe the exercise of a plaintiff's First Amendment rights; and (2) whether the "law enforcement activity" exception applies. *Becker v. IRS*, 34 F.3d 398, 408 (7th Cir. 1994).

To understand the significance of subsection (e)(7), an awareness of the factors that influenced the passage of the PA in 1974 is paramount. These factors included: (1) the explosion of computer technology; (2) the Watergate investigations; (3) the FBI's COINTELPRO operation; (4) revelations of flagrant abuses by the Internal Revenue Service in monitoring tax records for political purposes; and

(5) the Army's surveillance of civilians. *See* Steven W. Becker, Comment, *Maintaining Secret Government Dossiers on the First Amendment Activities of American Citizens: The Law Enforcement Activity Exception to the Privacy Act*, 50 DEPAUL L. REV. 675, 678-87 (2000) (examining the historical background of the PA). The common feature in all of these factors was "a profound fear concerning the collection and maintenance of information regarding the private activities of American citizens, conduct that unavoidably results in the creation of dossiers and the concomitant potential for governmental abuse through harassment and blacklisting." *Id.* at 686. As the Senate expressed in its statement of purpose: "[The Act] is designed to prevent the kind of illegal, unwise, over-broad, investigation and record surveillance of law-abiding citizens produced in recent years. . . ." S. REP. NO. 93-1183, at 1 (1974).

Despite the legislature's clear intent to prevent the creation of political dossiers through prohibiting the maintenance of First Amendment records, the circuit courts have employed a plethora of inconsistent standards to assess whether the retention of such records falls within subsection (e)(7)'s law enforcement activity exception, which is not defined in the Act. *See Becker*, 50 DEPAUL L. REV. at 687-96 (examining in detail the legislative history of subsection (e)(7)). It is this conflict that must be resolved.

A. *Bassiouni v. FBI.* In the present case, the Seventh Circuit panel has turned the Privacy Act on its head. Here, the FBI's records indicate that, in 1975, after conducting an investigation, the FBI concluded that Bassiouni "was not a member of any terrorist organization." Thus, the FBI's investigation of Bassiouni was terminated *more than 30 year ago*. Moreover, in its opinion, the panel admits that "[n]one

of the record memoranda concluded that Mr. Bassiouni was a member of a terrorist organization. Mr. Bassiouni denies any such membership, and the FBI concedes that it does not suspect him of ties to terrorist groups." (Pet. App. at 13a) It would appear to be a foregone conclusion that the maintenance in Bassiouni's name-retrievable file of highly prejudicial records describing numerous "terrorist" organizations, which make no reference to Bassiouni, is *per se* violative of the PA due to the stigmatizing effect through guilt by association, as the retention of such inflammatory documents is not in any way "pertinent to and within the scope of an authorized law enforcement activity" concerning Professor Bassiouni. Yet, the Seventh Circuit held otherwise; thereby allowing the law enforcement activity exception to swallow the PA's rule against the maintenance of First Amendment records.

In particular, the panel in *Bassiouni* predicated its holding that the maintenance of such records in Bassiouni's file was justified based on the FBI's assertion that the records were "related to *its* [i.e., the FBI's] law enforcement activities." (Pet. App. at 26a (emphasis added)) The panel reiterated this conclusion where it stated that it "believe[s] that the purposes identified by the Bureau fall within 'authorized law enforcement activity' conducted by the FBI." (Pet. App. at 26a) The relevant inquiry under the law enforcement activity exception, however, is not whether the FBI's present focus on "terrorism" is a legitimate law enforcement activity *of the FBI* but, rather, whether the continued maintenance of prejudicial records in Bassiouni's personal file is "pertinent to and within the scope of an authorized law enforcement activity" **involving Professor Bassiouni**. The language of section 552a(e)(7) is very specific in this regard: "Each agency that maintains a system of records shall– . . . maintain

no record describing how *any* ***individual*** exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7) (2000) (emphasis added). To divorce the law enforcement activity from the individual about whom the agency is retaining First Amendment records is not only to ignore the plain wording of subsection (e)(7) but would radically transform the PA from a congressional shield against abusive record keeping into an open-ended invitation for the establishment of citizen dossiers – the very evil the Act was designed to eradicate.

Nonetheless, the panel in *Bassiouni* established the following standard in assessing the application of the law enforcement activity exception: "We believe that Congress anticipated that, in the fulfillment of its responsibilities an agency must maintain information that it can reasonably demonstrate will be pertinent in its efforts to evaluate the significance of future situations." (Pet. App. at 28a) This, however, directly contradicts the most oft-quoted statement of congressional intent regarding subsection (e)(7), which explains that said provision was aimed at preventing the collection and maintenance of "protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency *might possibly have to deal with them in the future*." S. REP. NO. 93-1183, at 57 (1974) (emphasis added).

If there ever was a case in which the Act prohibited the continued maintenance of First Amendment records on the grounds of staleness and the potential for future abuse by an executive agency, this is it.

B. *Becker v. IRS.* In *Becker v. IRS*, 34 F.3d 398 (7th Cir. 1994), the Seventh Circuit addressed the question of whether section 552a(e)(7) permitted a government agency to maintain records in a citizen's individual file that described how that citizen exercised his or her First Amendment rights when the records were no longer pertinent to and within the scope of an authorized law enforcement activity regarding that individual. The district court had ruled that, although the maintenance of numerous newspaper articles and a book flyer in the plaintiffs' files, which made no reference to plaintiffs, implicated their First Amendment rights by implying that they associated with tax protesters and cheats, the IRS could retain such information because it had a right to conduct its initial investigation. *Becker v. IRS*, Nos. 91 C 1203-1205, 1993 U.S. Dist. LEXIS 4697, at *8-*9 (N.D. Ill. Apr. 12, 1993), *rev'd*, 34 F.3d 398 (7th Cir. 1994).

On appeal, the IRS argued that if its initial *collection* of information was pertinent to and within the scope of an authorized law enforcement activity, then it was justified in indefinitely *maintaining* the records in plaintiffs' files, regardless of whether its investigation of plaintiffs had ceased. In its opinion, the Seventh Circuit reversed the district court's grant of summary judgment to the IRS. *Becker*, 34 F.3d at 409. Specifically, the court held that the IRS had failed to demonstrate that its maintenance of records in the plaintiffs' files fell within the law enforcement activity exception. *Id.* The court noted that the records at issue dated from the middle to late 1980s and were contained in investigative files that were closed in April 1991. *Id.* at 408, 409. The court further held that "[w]e have examined the material, and any thought that it could be helpful in future enforcement activity concerning the Beckers is untenable." *Id.* at 409. The court also remarked that the continued

retention of the First Amendment documents in plaintiffs' files was contrary to the legislative intent of subsection (e)(7). Because the IRS failed to carry its burden of establishing that the materials were exempt from the PA's requirements, the court ordered the offending documents expunged. *Id.*

The panel's decision in *Bassiouni* is in direct conflict with the Seventh Circuit's previous holding in *Becker*, which prohibits the maintenance of First Amendment documents in an individual's name-retrievable file after the investigatory purpose *vis-a-vis* that individual has ceased. In other words, under *Becker*, an agency may not retain prejudicial First Amendment records in a citizen's file where the agency is no longer involved in a *current* investigation of the individual, and it cannot justify such maintenance based upon the agency's general investigatory needs. *Id.* ("We are not, however, faced with a situation where documents are maintained in a general [subject] file rather than in a specific individual's file.").

C. *J. Roderick MacArthur Foundation v. FBI.*

In *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600 (D.C. Cir. 1996), a two-to-one decision, the majority explicitly criticized the Seventh Circuit's reasoning in *Becker* and, in so doing, created a direct conflict between the circuits with respect to the proper interpretation of section 552a(e)(7)'s law enforcement activity exception. The issue, as framed by the District of Columbia Circuit, was virtually identical to that facing the court in *Becker*, *viz.*, whether an agency may continue to retain records describing an individual's First Amendment rights when, although the records were initially collected for a lawful purpose, the records are no longer pertinent to and within the scope of a

current law enforcement activity with respect to the individual. *See id.* at 602.

In *MacArthur Foundation*, the plaintiff was the president of a foundation that gave grants to groups involved with social, political, and economic issues. *Id.* at 601. In that capacity, the president met political dissidents and leaders from foreign countries. *Id.* Due to the president's associations, the FBI began to monitor his contacts. *Id.* The FBI maintained a file under the president's name; moreover, certain documents contained in the file referred to the president's "associational activities." *Id.* After the FBI released only redacted copies of some of the documents, the president and the foundation sued, *inter alia*, to enjoin the FBI from maintaining such records in the president's file and sought an order expunging the documents. *Id.* at 601-02.

In affirming the district court's grant of summary judgment to the FBI, the *MacArthur Foundation* majority asserted that "the [*Becker*] court's analysis of § (e)(7)," which was relied upon heavily by the appellant, "[wa]s neither clear nor compelling." *Id.* at 603. In addition, the *MacArthur Foundation* majority complained of the Seventh Circuit's use of expungement as a remedy for subsection (e)(7) violations: "A record disclosed pursuant to the Privacy Act or the FOIA is not thereby made unavailable for use in future law enforcement activities. A record expunged pursuant to the Privacy Act, on the other hand, is a record gone forever." *Id.*

The majority then set forth its own interpretation of the language of section 552a(e)(7). The majority read the phrase "pertinent to and within the scope of an authorized law enforcement activity" as modifying only the word "record,"

rather than the phrase "maintain no record." *Id.* More specifically, the majority stated:

> Nor do we think that the provision, as written, can be read to require that the maintenance of a record, as opposed to the record itself, must be pertinent to an authorized law enforcement activity. One might argue that the Congress meant to say that an agency may "maintain no record relating to first amendment activities unless doing so would be pertinent to and within the scope of an authorized law enforcement activity." But the Congress did not say that. . . .

Id. Although the majority conceded that an alternative interpretation was possible, it remarked that it was unaware of a reason to believe that Congress meant to say other than it did. *Id.* Because of its statutory interpretation, the majority also dismissed the president's argument that "information must be pertinent to a law enforcement activity not only when the agency collects the material but for as long as the agency maintains . . . the information." *Id.*

In sum, the majority adopted the following standard in assessing claims under subsection (e)(7):

> Accordingly, we hold that the Privacy Act does not prohibit an agency from maintaining records about an individual's first amendment activities if the information was pertinent to an authorized law enforcement activity when the agency collected the information. The Act does not require an agency to expunge records when they are no longer pertinent to a current law enforcement activity.

Id. at 605.

In contrast, Circuit Judge David Tatel rejected the majority's interpretation of subsection (e)(7), explicating the provision's language as follows:

> I would interpret section (e)(7), as a whole, to require that records be pertinent to "an authorized law enforcement activity" – words undefined in the statute – not only at the time of gathering, i.e., collecting, but also at the time of keeping, i.e., maintaining. In other words, if there is no current law enforcement activity to which a record has pertinence, the agency may not maintain it. Not only does this approach avoid effectively reading the word "maintain" out of that term's statutory definition, but it furthers the Act's purpose to protect citizens from the unnecessary collection and retention of personal information by the government.

MacArthur Foundation, 102 F.3d at 607 (Tatel, J., dissenting).

Judge Tatel further pointed out that the Act's legislative history indicated just as strong a concern over the maintenance of First Amendment records as their initial collection. *Id.* at 608. Judge Tatel concluded by citing Congress' concern over governmental secrecy and "Big Brother" surveillance, and stated that "[t]he fewer unnecessary files describing First Amendment activities the government keeps on law-abiding citizens, the lesser the chance of any future abuse of those files." *Id.*

D. *Clarkson v. IRS.*

The first appellate decision to interpret the law enforcement activity exception to section 552a(e)(7) was *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982). Clarkson was a law school graduate who was involved with a number of organizations that protested the federal tax system. *Id.* at 1369. After filing suit, Clarkson learned that the IRS was maintaining surveillance memoranda, news releases, and newsletters regarding his activities; however, such records were not kept in a file under his name, but rather were retained in a "Tax Protestor Project" file. *Id.* at 1373.

The appellate court held that plaintiff's political speech was clearly subject to the First Amendment protections of the Act, yet, because the record failed to show either the purpose of the monitoring or the practice of the IRS with respect to maintaining such speeches, the case was remanded to the district court for further consideration. *Id.* at 1374, 1375. In its opinion, the Eleventh Circuit set forth the following standard for interpreting the law enforcement activity exception: "We hold that to the extent that the IRS has engaged in the practice of collecting protected information, unconnected to any investigation of past, present or anticipated violations of the statutes which it is authorized to enforce, subsection (e)(7) of the Act has been violated." *Id.* at 1375. In addition, the court quoted the following language with approval:

> Merely because [an agency] *may* act within its authority by monitoring the public or private speeches of a person in the course of a legitimate security investigation does not give it the right to *maintain* records relating to the contents of these

> speeches where the investigation does not focus on a past or anticipated specific criminal act.

Id. at 1374 (quoting *Jabara v. Kelley*, 476 F. Supp. 561, 581 (E.D. Mich. 1979), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982)).

E. *Jabara v. Webster.*

The Sixth Circuit's decision in *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), followed shortly after that in *Clarkson*, but the court adopted a different standard for construing the law enforcement activity exception. In *Jabara*, the plaintiff, a Detroit attorney, was an active participant in Arab causes. *Jabara*, 476 F. Supp. at 564. The FBI investigated plaintiff's activities for a period of eight years. *Id.* Based upon the district court's finding that there was no evidence whatsoever in the record "linking plaintiff to the commission or anticipated commission of any specific crime," it granted plaintiff's motion for summary judgment with respect to liability on the PA claim, reasoning that subsection (e)(7)'s law enforcement activity exception was inapplicable to "records which do not relate to specific past, present or future criminal acts." *Id.* at 564, 581, 582.

On appeal, the Sixth Circuit vacated the district court's grant of summary judgment on the PA issue and remanded for reconsideration under a different standard. *See Jabara*, 691 F.2d at 280. In this regard, the appellate court held that section 552a(e)(7) "allows investigation with respect to the exercise of first amendment rights if such investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." *Id.* at 278-80.

F. *MacPherson v. IRS.*

Another method of interpreting the law enforcement activity exception was adopted by the Ninth Circuit in *MacPherson v. IRS*, 803 F.2d 479 (9th Cir. 1986). The plaintiff in *MacPherson*, who was an attorney specializing in criminal tax law, was monitored by IRS agents, who anonymously attended a number of conventions at which plaintiff spoke, made notes of plaintiff's addresses, and bought tapes of his speeches. *Id.* at 480. The information was maintained in a "Tax Protestor Project File," and not in a file under plaintiff's name. *Id.* at 480, 485 n.9. In addition, the court pointed out that plaintiff "[wa]s not suspected or accused of any past, present, or anticipated illegal conduct or of the advocacy of illegal acts or violence." *Id.* at 480.

In *MacPherson*, the Ninth Circuit adopted an "individual, case-by-case basis" approach for considering the factors to be weighed under subsection (e)(7) for and against the retention of records that describe First Amendment exercise. *Id.* at 484. Although the court ruled that the maintenance of records in this particular case fell within the law enforcement activity exception, the Ninth Circuit was very deliberate in expressly narrowing its holding to the specific facts involved, cautioning:

> We emphasize that we do not decide a number of similar but potentially distinguishable situations that may arise. For example, we do not decide whether the records of MacPherson's speeches would be "pertinent to and within the scope of an authorized law enforcement activity" if the records were filed under his name rather than in a general "tax protestor" file. Likewise we do not

> decide whether records of the activities of other individuals at the conventions and conferences who did not give public speeches and whose comments were not recorded for sale would fall within the "law enforcement activities" exception. Such cases might raise additional questions about the "scope" of the law enforcement activity involved.

Id. at 485 n.9.

G. *Patterson v. FBI.*

The Third Circuit adopted yet another standard under section 552a(e)(7) in the bizarre case of *Patterson v. FBI*, 893 F.2d 595 (3d Cir. 1990). In *Patterson*, the plaintiff, a sixth-grade student in elementary school, resolved to write a world encyclopedia as a school project. *Id.* at 597. In order to obtain his information, the child wrote to all of the world's 169 countries. *Patterson v. FBI*, 705 F. Supp. 1033, 1036 (D.N.J. 1989), *aff'd*, 893 F.2d 595 (3d Cir. 1990). Due to the amount of foreign correspondence the child received, the FBI opened an investigation and visited his home unannounced. *Id.* As a result, the FBI maintained at least one file (and possibly six files) on the child. *Id.* at 1036, 1037, 1044. After the child initiated suit through his father, the FBI responded to his discovery requests by formally claiming military and state secrets privilege by means of an affidavit from the United States Attorney General. *Id.* at 1038.

In affirming the district court's grant of summary judgment for the FBI on plaintiff's PA claim, the Third Circuit adopted a relevancy standard in interpreting the law enforcement activity exception: "We, therefore, hold that a

federal agency defending its maintenance of records under Section (e)(7) must demonstrate that its records on an individual's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the agency." *Patterson*, 893 F.2d at 603. The court concluded by stating that the maintenance of records in plaintiff's case met this requirement and that "[c]ontinued maintenance" would not violate the Act. *Id.*

H. *Wabun-Inini v. Sessions.*

Finally, in *Wabun-Inini v. Sessions*, 900 F.2d 1234 (8th Cir. 1990), the Eighth Circuit briefly addressed the law enforcement activity exception. In *Wabun-Inini*, after the plaintiff dropped off two rolls of color film to a one-hour photo shop to be processed, an FBI agent entered the establishment and requested a set of prints from plaintiff's negatives, which the store manager allowed the agent to purchase. *Id.* at 1236. In a cursory treatment of the PA issue, the Eighth Circuit held that the FBI's conduct fell within the law enforcement activity exception because the district court found that the FBI had probable cause to seize the pictures. *Id.* at 1246. The court, however, did not adopt a specific standard of interpretation and stated that it preferred "to delay a closer scrutiny of the law enforcement exemption until the issue is more carefully framed and necessary to the decision." *Id.*

In sum, in light of the current conflict in no less than seven circuits, the importance of safeguarding the significant First Amendment interests at stake, the legislature's clear intent to prevent the compilation of political dossiers, and the real and present danger for the abuse of such files in the present "war against terrorism," this Court should grant

Professor Bassiouni's petition. *See* U.S. SUP. CT. R. 10(a) (providing that the Court will consider granting a writ of *certiorari* where a court of appeals enters a decision "in conflict with the decision of another United States court of appeals on the same important matter").

II. Certiorari Should Be Granted To Resolve An Important Question Of Federal Law Concerning The Seventh Circuit's Unprecedented Violation Of Rule 10(a) Of The Federal Rules Of Appellate Procedure Where, In Rendering Its Decision, The Court Reviewed *Ex Parte* A Classified FBI Declaration That Was Never Filed In The District Court, Considered By The District Court Judge, Or Made Part Of The Record On Appeal, And That Was Submitted By The FBI For The First Time After Oral Argument In The Court Of Appeals.

> Democracies die behind closed doors. . . . A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution.
>
> – *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683, 710 (6th Cir. 2002).

Herein, the Seventh Circuit committed a flagrant violation of Federal Rule of Appellate Procedure 10(a), as well as of Professor Bassiouni's due process rights, where it agreed to consider *ex parte* a secret FBI declaration, which was never considered by the district court judge nor made part of the district court record or record on appeal, that was submitted by the FBI for the first time on appeal *after* oral argument in an effort to justify the agency's maintenance of de-classified documents in Professor Bassiouni's PA file.

(Pet. App. at 20a-23a) Because of the circuit court's exceptional departure from well-established federal law, this Court should grant *certiorari*.

Rule 10(a) of the Federal Rules of Appellate Procedure provides that only materials filed with the district court will "constitute the record on appeal." FED. R. APP. P. 10(a). In this regard, it is a fundamental principle that "[a]n appellate court can properly consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal." *Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1175 (8th Cir. 1989) (striking affidavit because it was "presented for the first time at the appellate stage, it is not part of the record for our review"). *See Rosen v. Lawson-Hemphill, Inc.*, 549 F.2d 205, 206 (1st Cir. 1976) (holding that "[i]t is elementary that the rights of the parties are, for purposes of . . . appeal, determined on the basis of the materials that constitute the record on appeal" and ruling that attempts to supplement the record by making factual assertions not in the record must be disregarded by the appellate court).

Similarly, in *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987), the court explained that "[t]he parties may rely on appeal only on materials furnished to the district judge. Otherwise they deprive the opposing party of an opportunity to comment on them and the district judge of an opportunity to evaluate their significance." *Henn*, 819 F.2d at 831. As this Court recently iterated, "The right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). Moreover, for more than a century, this Court has declared that "due process of law signifies a right to be heard in one's defense." *Hovey v. Elliott*, 167 U.S. 409, 417 (1897)

(followed by *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)). *See* U.S. CONST. amends. V, XIV. As Justice Jackson explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), procedural due process requires, at a minimum, prior notice and an opportunity for an appropriate hearing. *Id.* at 313. *Cf. Crawford*, 541 U.S. at 50 (pointing out that the principal evil at which the Sixth Amendment's Confrontation Clause was directed was the "use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's . . . that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried").

In its opinion, the Seventh Circuit conceded that "[w]e ordinarily hold fast to the principle that Federal Rule of Appellate Procedure 10 was designed to ensure a complete record, not to 'facilitate collateral attacks on the verdict' with documents that the district court did not consider." (Pet. App. at 21a) The panel further wrote that "[w]e agree with Mr. Bassiouni that, ideally, (1) the FBI (or other law enforcement agencies) should proffer the evidence for in camera review to the district court, (2) the classified document should be made part of the (sealed) record, and (3) the district court should then inform the parties whether or not it relied on the classified information in rendering its decision." (Pet. App. at 22a) Yet, the panel then opined that "we do not believe that the evidentiary submission can be considered 'ordinary' for several reasons." (Pet. App. at 22a) The panel, however, provided no legal precedent for departing from the Federal Rules of Appellate Procedure in this case.

Thus, not only was Professor Bassiouni deprived of his most fundamental due process rights by this aberrant procedure, but, in addition, there seems to be no legal authority whatsoever for the FBI's attempt to justify the maintenance of *de-classified* documents in Professor Bassiouni's PA file through the use of a *classified* declaration. This is not the type of case, such as a FOIA *access* suit involving undisclosed documents where the agency asserts Exemption 1, in which a classified declaration is permissible as a substitute for a *Vaughn* index because a public declaration would reveal the very information the exemption was designed to prevent. *See, e.g.*, *Hayden v. NSA/CSS*, 608 F.2d 1381, 1384-85 (D.C. Cir. 1979) (allowing the submission of classified affidavit *in camera* where to place *Vaughn* itemization and justification "on public record could damage security in precisely the way that FOIA Exemption 1 is intended to prevent"); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 46-47 (D.D.C. 2003) (permitting use of classified affidavit in FOIA access suit involving agency withholding claims under Exemptions 1 and 7(D)). Instead, the instant case is a PA *amendment* suit involving documents that have already been *de-classified* and that the FBI has already disclosed. Therefore, there is no justification for the panel's consideration of a classified declaration in this context.

Accordingly, because the Seventh Circuit decided an important question of federal law in a manner that constitutes an unprecedented violation of the Federal Rules of Appellate Procedure, this Court should grant Bassiouni's petition and condemn such a departure from established appellate practice in the strongest terms. *See* U.S. SUP. CT. R. 10(c).

CONCLUSION

For the reasons set forth above, the Petitioner, M. Cherif Bassiouni, respectfully prays that a writ of *certiorari* issue to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JANUARY 30, 2006

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3888

MAHMOUD C. BASSIOUNI, also known as
CHERIF BASSIOUNI,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

Argued June 9, 2005—Decided January 30, 2006

Before RIPPLE, MANION and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Pursuant to the Privacy Act, 5 U.S.C. § 552a, Mahmoud Cherif Bassiouni sought to amend records maintained by the Federal Bureau of Investigation ("FBI" or the "Bureau") that pertained to his contacts with, and activities concerning, the Middle East. After exhausting his administrative remedies, Mr. Bassiouni filed this action under the Privacy Act's enforcement provisions, *id.* § 552a(g). The district court granted summary judgment to the FBI; it held that the records were exempt from the Privacy Act's

amendment requirements. Mr. Bassiouni now appeals. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. The Privacy Act—An Overview

Because this case requires an understanding of the Privacy Act, we shall depart from our usual format and set forth an analysis of its pertinent provisions before turning to the background of this case.

1.

a. general provisions

Under the Privacy Act, agencies, such as the FBI, that maintain "a system of records"[1] concerning individuals are required to do so "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual." *Id.* § 552a(e)(5). In addition to the accuracy requirement, agencies are prohibited from maintaining certain types of information in those records, including information "describing how any individual exercises rights guaranteed

1. A system of records is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some" other identifying characteristics. 5 U.S.C. § 552a(a)(5). The parties agree that the FBI's Central Records System is such a "system of records."

by the First Amendment." *Id.* § 552a(e)(7). The prohibition on maintaining First Amendment-related records, however, does not apply when those records are "pertinent to and within the scope of an authorized law enforcement activity." *Id.*[2] The Act does not define a "law enforcement activity," and the phrase does not appear elsewhere in the statute.

In addition to setting forth limitations on agency record keeping, the Act also contains remedial measures. The Act first provides an individual with the right to access his records upon request, *id.* § 552a(d)(1), and allows him to request amendment or correction of his records, *id.* § 552a(d)(2). In response to such a request, the agency either must amend the records or inform the individual of its reason for refusing to amend. *Id.* § 552a(d)(2)(B). An individual unsatisfied with the agency's response may pursue an administrative appeal. *Id.* § 552a(d)(3). If the internal mechanism fails to resolve the individual's request, he may seek review of the agency's decision in federal court. *See id.* § 552a(g)(1)(A)-(B).

b. exemptions

In some cases, agencies may exempt certain record systems from Privacy Act requirements and, specifically for our purposes, the § 552a(d) amendment process. Section 552a(j), entitled "General exemptions," allows the head of an agency

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2. Specifically, 5 U.S.C. § 552a(e)(7) provides that an agency shall:

> maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

"to exempt any system of records within the agency from any part of" the Act if the system is maintained by a law enforcement agency and if the information concerns certain criminal investigation functions. *Id.* § 552a(j)(2). Under this section, however, an agency may not exempt a system of records from § 552a(e)(7), which prohibits an agency from maintaining records describing an individual's exercise of his First Amendment rights. *See id.* § 552a(j).

In addition to the general exemption provision, agencies may exempt record systems from specific sections of the Act if the records are maintained "for law enforcement purposes." *Id.* § 552a(k)(2). The amendment process of § 552a(d) is among those that may be exempted. *Id.* § 552a(k).[3] Yet, although an agency may exempt its record system from the amendment process, the agency still may not keep records of activity that is protected by the First Amendment.

c. remedial provisions

The Privacy Act provides limited civil remedies for individuals seeking redress for an agency's noncompliance. The Act allows an individual to seek redress in federal court if an agency does not allow the individual to review his record as required by § 552a(d)(1), *see id.* § 552a(g)(1)(B), or if an agency has refused to amend a record, *see id.* § 552a(g)(1)(A).[4] An individual also may challenge an agency's

3. The FBI properly has exempted its Central Records System from § 552a(d)'s amendment process pursuant to § 552a(k). *See* 28 C.F.R. § 16.96.

4. Both § 552a(g)(1)(A) and § 552a(g)(1)(B) refer specifically to the provisions of § 552a(d) to which they apply. Neither civil suit provision requires the plaintiff to show that he suffered harm as a result of the challenged agency action.

failure to maintain records with the accuracy, relevance, timeliness and completeness required by § 552a(e)(5), but only if the plaintiff demonstrates that the agency action had an "adverse" effect on him. *Id.* § 552a(g)(1)(C). Similarly, § 552a(g)(1)(D) provides a catchall cause of action for circumstances in which an agency "fails to comply with any other provision" of the Act; however, like the relief provided in § 552a(g)(1)(C), "an adverse effect on an individual" is also a prerequisite to a § 552a(g)(1)(D) action.

2.

At the heart of this dispute is the interplay between § 552a(e)(7)'s protection against maintenance of records concerning First Amendment activities and that same subsection's built-in exemption for records "pertinent to and within the scope of an authorized law enforcement activity." However, the Act nowhere defines "law enforcement activity" as used in subsection (e)(7). We turn, therefore, to the Privacy Act's legislative history for further guidance in discerning the meaning of this term.

The Privacy Act's lack of precision in defining law enforcement activity may be attributed to the circumstances of its drafting and passage. The Act passed quickly in the late months of the 93rd Congress. As one commentator noted:

> Passage of the . . . Act was both aided and hindered by the Congress' focus on Watergate and the impeachment hearings involving former President Nixon: aided, because the Watergate

> scandals had involved allegations of illegal wiretapping and surveillance of private citizens by federal agencies; and hindered, because the impeachment process left little time for other legislation until the closing months of the session.

Cornish F. Hitchcock, *Overview of the Privacy Act, in* Guidebook to the Freedom of Information and Privacy Acts 2-28 (Justin D. Franklin & Robert F. Bouchard eds., 2d ed.2005) (hereinafter "Guidebook").

"Congress felt it was important to pass some kind of privacy protection before adjourning," *id.* at 2-27, and two bills concerning the limits of governmental intrusion into personal privacy were proposed in the Senate and in the House of Representatives, *see* S. 3418, 93d Cong. (1974), *reprinted in* Legislative History of the Privacy Act of 1974: Source Book on Privacy 9 (GPO 1976) (hereinafter "Source Book"); H.R. 16373, 93d Cong. (1974), *reprinted in* Source Book 239. Neither bill represents the final version of the Privacy Act. Indeed, due to time constraints, the bills were not reconciled through a formal conference. *See* Guidebook 2-27. Rather, members from the respective House and Senate committees "met informally and agreed on a compromise." Steven W. Becker, *Maintaining Secret Government Dossiers on the First Amendment Activities of American Citizens: The Law Enforcement Activity Exception to the Privacy Act*, 50 DePaul L.Rev. 675, 695 (2001) (citing 120 Cong. Rec. 40,400 (1974) (statement of Sen. Ervin), *reprinted in* Source Book 846).

Appendix A

During the compromise process, certain provisions were incorporated from both the House and Senate versions and, in some circumstances, entirely new material was added. At the close of the process, House and Senate staff members prepared an "Analysis of House and Senate Compromise Amendments to the Federal Privacy Act." *See* Source Book at 858 (Senate); *id.* at 987 (House) (collectively hereinafter, "Staff Analysis"). This document took the place of the Conference Report, which usually represents "the most definitive record of the legislative history and intent of the law as enacted." Guidebook 2-32.

However, despite the limited legislative history, it is evident that Congress expressed particular concern with the Government's action in collecting information about citizens' exercise of their First Amendment rights. Both the Senate and the House versions of the bill contained protections to address these concerns. In the Senate bill, section 201(b)(7) provided that an agency shall "establish no program for the purpose of collecting or maintaining information describing how individuals exercise rights guaranteed by the first amendment unless the head of the agency specifically determines that such program is required. . . ." S. 3418 § 201(b)(7), *reprinted in* Source Book 130. The Senate committee report explained that section 201(b)(7)

> reflect[ed] the preferred status . . . accord[ed] to information touching areas protected by the First Amendment. . . . It [wa]s aimed at protecting Americans in the enjoyment of the privacy of their thoughts, habits, attitudes and beliefs in matters

> having nothing to do with the requirements of their dealings with an agency seeking information.

S.Rep. No. 93-1183, at 56 (1974), *reprinted in* Source Book 209. Moreover, the committee noted, section 201(b)(7) was "directed to the planning stage of any . . . programs being designed for the principle purpose of identifying Americans who exercise their rights under the First Amendment," and was "aimed particularly at preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." S.Rep. No. 93-1183, at 57, *reprinted in* Source Book 210. Section (e)(4) of H.R. 16373, the House equivalent to § 201(b)(7),[5] was both broader and narrower than the Senate version; it stated simply that an agency shall "maintain no record concerning the political or religious belief or activity of any individual, unless expressly authorized by statute or by the individual about whom the record is maintained." H.R. 16373 § 552a(e)(4), *reprinted in* Source Book 285; *see* H.R.Rep. No. 93-1416, at 16, *reprinted in* Source Book 309.

After the bills were proposed in both Houses of Congress, members expressed concern that the analogues to § 552a(e)(7) were overly broad and would hamper legitimate law enforcement efforts. For example, a sponsor of H.R. 16373 assured the House that section 552a(e)(4) would not prevent the FBI from "maintaining records as to political beliefs" if the records concerned the Communist Party or

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5. With an amendment discussed below, H.R. 16373 is the direct precursor to 5 U.S.C. § 552a(e)(7).

other groups dedicated to the violent overthrow of the Government. *See* 120 Cong. Rec. 36,444-45, *reprinted in* Source Book 885-86.

This concern prompted Representative Ichord to propose a proviso to *section 552a(e)(4)*, which was adopted in the final version of H.R. 16373: "*Provided, however*, That the provisions of [*section 552a(e)(4)]* shall not be deemed to prohibit the maintenance of any record of activity which is pertinent to and within the scope of a duly authorized law enforcement activity." *See* H.R. 16373 *§ 552a(e)(4), reprinted in* Source Book 447. In introducing his amendment, Representative Ichord articulated his concerns that the broadly worded *section 552a(e)(4)* might allow subversive groups to use the First Amendment as a cover for illegal activities:

> [I]n its present form it is clear that [section 552a(e)(4)] can be construed to cover activities which are properly within the scope of legitimate law enforcement. I am assured that the authors of this measure have not intended the provisions to foreclose this proper purpose.
>
> The terms of the broad prohibitions on maintenance of records relating to "political" and "religious" activities would, for example, embrace the activities of the Communist Party and similar groups, which, although generally recognized as conspiratorial or clandestine, are nevertheless commonly described as "political." Similarly, certain sects within the Black Muslim movement,

> which have been described by the Director of the FBI as endangering the internal security, may claim protection under this clause as a "religious" activity.
>
> Although those records of political or religious activity which are "expressly authorized by statute," are excepted from the prohibitions of this paragraph, this is not adequate to exempt the activities of such subversive groups as I have indicated. I know of no existing or enforceable statute which expressly and generally authorizes any particular agency to maintain the records of political or religious activities of subversive groups....
>
> I believe this clarifying amendment would obviate any ambiguities as to the reach of the prohibition, and would serve to eliminate any adverse litigation on the subject.

120 Cong. Rec. 36,650 (1974) (statement of Rep. Ichord), *reprinted in* Source Book 900-01; *see also* Guidelines for Implementing Section 552a of Title 5 of the United States Code, 40 Fed.Reg. 28965 (1975), *reprinted in* Source Book 1074.

Representative Ichord then clarified that, "[i]n referring to a 'law enforcement activity' [as used in 5 U.S.C. § 552a(e)(7)] and 'law enforcement purposes' [as used in 5 U.S.C. § 552a(k)(2)], I am of course, using the expression 'law enforcement' in its general meaning and in the broadest

reach of the term." 120 Cong. Rec. 36,651, *reprinted in* Source Book 902. He continued:

> I want to emphasize—so that there is no misunderstanding—these changes are designed to protect only legitimate national or internal security intelligence and investigations, and no records or files shall be kept on persons which are not within constitutional limitations. Let the legislative history be explicit. None of these changes are intended to abridge the exercise of first amendment rights. The rights of Americans to dissent in a lawful manner and for lawful purposes must be preserved.

Id., *reprinted in* Source Book 902-03.

The provision that had been section 552a(e)(4) in H.R. 16373 emerged from the informal compromise process in its current form, 5 U.S.C. § 552a(e)(7). The final provision somewhat broadened H.R. 16373's protections, by adopting S. 3418's protection of "rights guaranteed by the First Amendment" as opposed to H.R. 16373's protection of "the political or religious belief or activity of any individual." Source Book 385. However, the compromise bill also adopted Representative Ichord's exception for "law enforcement activity." The only statement concerning the compromise section came from the congressional staff analysis, and added little toward interpreting the scope of the term "law enforcement activity":

> The compromise broadens the House provisions [sic] application to all First

> Amendment rights and directs the prohibition against the maintenance of records. However, as in the House bill, it does permit the maintenance, use, collection or dissemination of these records which are expressly authorized by statute or the individual subject or are pertinent to a duly authorized law enforcement activity.

See Staff Analysis, *reprinted in* Source Book 860.

3.

After reviewing the text of 5 U.S.C. § 552a and the legislative history, we believe that certain principles are clear. First, in enacting § 552a, Congress was motivated by a general concern with the potential for abuse if the Government is allowed to collect political dossiers about American citizens. Second, Congress was concerned that overly restrictive limitations on the Government's ability to collect criminal intelligence would hamper legitimate law enforcement efforts. Third, Congress' concern about restricting law enforcement was highest in areas of agency activity affecting the security of our Nation. In our decision, we must acknowledge these legislative concerns in order to give effect to the intent of Congress.

B. Facts

Mr. Bassiouni, a law professor at DePaul University, is a former president of the Association for Arab-American University Graduates ("AAAUG") and of the Mid-America Arab Chamber of Commerce ("AACP"). His academic work

focuses on the fields of international law and human rights, and he has extensive experience in these areas.

In a letter dated November 22, 1999, Mr. Bassiouni requested access to any records concerning himself or his activities that were in the possession of the FBI's Central Records System. On March 23, 2001, the FBI released forty-nine pages of redacted records accompanied by a transmittal sheet dated 1983. The materials consisted of several Bureau memoranda carrying dates from 1970 to 1975. One of the memoranda contained excerpts from a speech that Mr. Bassiouni had given to the AACP in 1973; it, however, did not report the full text of the speech. The records referenced a number of groups described as "terrorist," and one group, the Popular Front for the Liberation of Palestine ("PFLP"), currently is listed among the designated Foreign Terrorist Organizations by the United States Department of State. None of the record memoranda concluded that Mr. Bassiouni was a member of a terrorist organization. Mr. Bassiouni denies any such membership, and the FBI concedes that it does not suspect him of ties to terrorist groups.

On April 23, 2001, Mr. Bassiouni requested that the FBI amend his records pursuant to the Privacy Act, 5 U.S.C. § 552a. He claimed that the amendment was required because, among other things, (1) the records were inaccurate and incomplete; (2) the records described activities protected by the First Amendment; and (3) the records were outdated. On February 6, 2002, the FBI denied his request on the ground that the records were exempt from amendment under the Act because the "information is a reasonably accurate, relevant, and timely account of the results of our investigation and is

completely relevant to the investigative purpose for which it was collected." R.1, Ex.C. On March 4, 2002, Mr. Bassiouni then filed an internal appeal. The FBI denied his appeal but suggested that he could forward a "Statement of Disagreement," which would be included in the file. *Id.*, Ex.E. Mr. Bassiouni did not send a statement but instead brought this action for declaratory and injunctive relief pursuant to 5 U.S.C. § 552a(g)(1).

C. District Court Proceedings

Mr. Bassiouni's suit alleged that the FBI maintained records on him that were untimely, were inaccurate and contained information with respect to his First Amendment activities, all in violation of the Act. *See* 5 U.S.C. § 552a(e)(5), (e)(7). In addition to costs and fees, he sought (1) expungement of the records from the Central Records System; (2) an injunction prohibiting the maintenance of such records; and (3) "such further relief as th[e District] Court deems just and proper." R.1-1 at 3.

The FBI moved to dismiss the action for failure to state a claim upon which relief could be granted. *See* Fed.R.Civ.P. 12(b)(6). It maintained that Mr. Bassiouni's suit was barred by the statute of limitations, that the Bureau's records were exempt from Mr. Bassiouni's Privacy Act claim and that Mr. Bassiouni failed to allege any adverse effect from the Bureau's maintenance of his records. The district court rejected the FBI's arguments and held that Mr. Bassiouni's complaint stated a claim for relief.

The parties later filed cross-motions for summary judgment. Mr. Bassiouni argued that he was entitled to

summary judgment on both his § 552a(e)(5) and § 552a(e)(7) claims. According to Mr. Bassiouni, the file maintained by the FBI violated § 552a(e)(5) because it included references to a number of organizations, with the exception of the AAAUG, with which Mr. Bassiouni never had been associated. Not only was the inclusion of this "highly prejudicial and inflammatory" material irrelevant, continued Mr. Bassiouni, it also was untimely because the file indicated that the FBI's investigation of him "was terminated in 1975." R.19, Memorandum of Law at 4-5. Finally, Mr. Bassiouni alleged that the file was not complete because it contained a summary, as opposed to the full text, of a speech that he had given.

Mr. Bassiouni also claimed that he was entitled to summary judgment on his § 552a(e)(7) claim because it was undisputed that his file contained information regarding his First Amendment activities. According to Mr. Bassiouni, these records did not fall within the exception for law enforcement activities set forth in § 552a(e)(7). Also, relying on this court's decision in *Becker v. Internal Revenue Service*, 34 F.3d 398 (7th Cir.1994), Mr. Bassiouni argued that, even if the initial collection of the information contained in the file was justified, "the agency must demonstrate that its continued *maintenance* of records . . . is 'pertinent to and within the scope of an authorized law enforcement activity.' " *Id.*, Memorandum of Law at 10 (citing *Becker, 34 F.3d at 409)* (emphasis in original). Because the FBI had failed to establish a legitimate law enforcement reason for maintaining his records, Mr. Becker concluded, he was entitled to summary judgment.

Appendix A

The FBI filed a cross-motion for summary judgment. With respect to Mr. Bassiouni's § 552a(e)(5) claim, the FBI explained:

> The balance of Plaintiff's complaint is that he is entitled to amendment of the records pursuant to section (d)(2) because they violate the standards for accuracy established by section (e)(5). Although the Privacy Act provides a method for individuals to seek amendment of inaccurate records, 5 U.S.C. § 552a(d)(2)-(3), it also permits agencies to exempt certain systems of records from the record amendment provisions. See 5 U.S.C. § 552a(j) and (k). Relying on these provisions, the FBI has promulgated regulations that specifically exempt records maintained in its Central Records System . . . from section (d)(2) to the extent that information in this system is subject to exemption pursuant to sections (j) and (k). . . . Thus the FBI is entitled to summary judgment on Plaintiff's (d)(2) claim if the records in question are (1) maintained in the [Central Records System] and (2) subject to the Privacy Act's exemption provisions.
>
> Both of these criteria are met here. . . .

R.22, Memorandum at 7-8.

Turning to the § 552a(e)(7) claim, the FBI argued that it was entitled to summary judgment because it had a legitimate law enforcement purpose for maintaining the file on Mr.

Bassiouni. These law enforcement purposes were set forth in the Declaration of Supervisory Special Agent James Krupkowski (the "Krupkowski Declaration" or "Declaration") that was submitted with the Bureau's motion for summary judgment. The Declaration acknowledged that the agency had determined that Mr. Bassiouni was not a member of a terrorist organization. It further claimed that the exact relevance of Mr. Bassiouni's records was classified. However, the Krupkowski Declaration submitted that Mr. Bassiouni's records were relevant to current "investigative interests" because: (1) investigation of terrorism is the FBI's top priority; (2) due to his contacts, the FBI will continue to receive information about Mr. Bassiouni and will need the records to provide context with which to evaluate that new information; and (3) the records are important for evaluating the credibility and veracity of the FBI's sources. Moreover, the Declaration pointed out that, if there were a terrorist event related to one of the groups with which Mr. Bassiouni had contact, "there will be an intense interest in what the FBI knew and when it knew it. Destruction or amendment of the records would impede such an inquiry." R.22, Ex.1 ¶ 12.

The Bureau also offered a classified version of the Krupkowski Declaration ("Classified Declaration") for the district court's in camera inspection. *See id.*, ¶ 2. The Classified Declaration purported to detail the FBI's investigative purposes. The district court, however, resolved the crossmotions for summary judgment on the information contained in the public Krupkowski Declaration alone.

In addressing the parties' arguments, the district court noted that § 552a(e)(5) and (e)(7) "do not, in themselves,

give rise to a cause of action." R.36 at 7. "[I]t is the FBI's refusal to amend records under subsection (d)(3), rather than its alleged violations of (e)(5) and (e)(7), that give rise to this cause of action" pursuant to § 552a(g). *Id.* at 7-8.

The court further noted that § 552a(k)(2) allows the FBI to exempt any system of records from the subsection (d) administrative amendment process if the system of records "contains investigatory material compiled for law enforcement purposes." *Id.* at 8 (quoting 5 U.S.C. § 552a(k)(2)). Without extended discussion, the court also observed that "the same analysis applies to the FBI's alleged violations of subsection (e)(7)." *Id.* at 9, n. 1. Thus, the court determined that Mr. Bassiouni could not maintain an action to amend the records if they were compiled for a law enforcement purpose, a fact established by the public Krupkowski Declaration. Consequently, Mr. Bassiouni's action for declaratory and injunctive relief failed.

In this appeal, Mr. Bassiouni challenges only the district court's grant of summary judgment on his § 552a(e)(7) claim that the FBI is illegally maintaining records concerning his First Amendment activities; he does not challenge the district court's determination with respect to his claim pursuant to § 552a(e)(5).

Appendix A

II

DISCUSSION

A. Standard of Review

We review the district court's grant of a motion or cross-motion for summary judgment de novo. *Gazarkiewicz v. Town of Kingsford Heights, Indiana*, 359 F.3d 933, 939 (7th Cir.2004). "In considering cross-motions for summary judgment, we are obliged to view all facts and draw all reasonable inferences in a light most favorable to the party against whom the motion under consideration is made," here Mr. Bassiouni. *Id.*

B. Summary Judgment

As we have noted above, the central question on appeal is whether the FBI's maintenance of Mr. Bassiouni's file violates § 552a(e)(7). In addressing this issue, the parties agree that the records contained in Mr. Bassiouni's file pertain to his First Amendment activities. We shall now examine the matters on which there is disagreement.

Mr. Bassiouni presents several arguments on appeal.[6] Mr. Bassiouni submits that there is no support for the district

6. Mr. Bassiouni first asserts that an agency may not exclude a system of records from the requirements of § 552a(e)(7) by using its discretion under § 552a(k)(2) to exempt the records from the administrative amendment process. We agree with Mr. Bassiouni on this point. The language of § 552a(k)(2) clearly precludes an exemption for § 552a(e)(7), and further discussion on this point is not warranted.

court's holding that challenges based on § 552a(e)(7) only may be brought under § 552a(g)(1)(C) or (D), and thus require a showing of adverse effect. He also maintains that the district court erred by not considering his request for the expungement of his records. Mr. Bassiouni finally claims that he was entitled to judgment as a matter of law because the FBI plainly is maintaining his records in violation of § 552a(e)(7).

The FBI makes one primary argument: It is entitled to summary judgment on Mr. Bassiouni's claims because its maintenance of Mr. Bassiouni's records is "pertinent to and within the scope of an authorized law enforcement activity," and therefore complies with § 552a(e)(7).

We turn now to an analysis of these submissions.[7]

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7. At the outset, we must resolve one issue. At oral argument, the FBI offered members of the panel access to the Classified Declaration that purported to give greater detail concerning how the matters contained in Mr. Bassiouni's file are related to a law enforcement activity. The FBI had offered to make this same declaration available to the district court; however, as set forth previously, the district court did not accept the FBI's offer, apparently in the belief that the public Krupkowski Declaration was sufficient to establish the statutory requirements. We accepted the FBI's offer, and the members of this panel viewed the Classified Declaration in camera.

After we had viewed the classified document, Mr. Bassiouni moved to bar its consideration. In his motion, Mr. Bassiouni maintains that we cannot consider the Confidential Declaration because "he did not have the opportunity to object to it at the district

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court level." *See* Mot. Reconsid. Ct.'s Order Dated June 10, 2005, To Review Classified Declaration at 2-3.

We ordinarily hold fast to the principle that Federal Rule of Appellate Procedure 10 was designed to ensure a complete record, not to "facilitate collateral attacks on the verdict" with documents that the district court did not consider. *See Shasteen v. Saver*, 252 F.3d 929, 935 n. 2 (7th Cir.2001). However, we do not believe that the evidentiary submission can be considered "ordinary" for several reasons.

Although the Classified Declaration was not made a part of the record below, both the district court and Mr. Bassiouni were made aware of its existence, and its availability as evidence, during briefing on the Bureau's motion for summary judgment. *See* R.22, Memorandum at 7 n. 4. The Bureau renewed this offer in its reply brief in support of summary judgment. *See* R.35 at 9 ("Should the [district court] find that the public record is not sufficiently detailed, [it] should order an *ex parte*, *in camera* review of the classified Krupkowski Declaration. . . ."). The district court did not avail itself of the offer, choosing instead to rely on the public declaration. The FBI made a similar offer to this court in its appellate brief. *See* Appellee's Br. at 11, 21. Mr. Bassiouni never voiced any objection to this offer in any of his submissions to the district court, nor did he join this issue in the briefing prior to oral argument. Consequently, we do not believe that Mr. Bassiouni was deprived of the opportunity to voice his objections to the court's consideration of that document.

Mr. Bassiouni also intimates, but does not argue directly, that this court is precluded from considering the Classified Declaration because Congress has not explicitly allowed for such consideration in the language of the Privacy Act. Again, we are not persuaded by

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this argument. Mr. Bassiouni has not pointed to any statutory prohibition with respect to this type of submission. Additionally, implying such a prohibition would be at odds with congressional concern that the Act not impede legitimate law enforcement activities. We do not believe that Congress meant to place law enforcement agencies in the catch-22 of either divulging current investigatory activities or not asserting the law enforcement exception specifically provided in the Act.

We agree with Mr. Bassiouni that, ideally, (1) the FBI (or other law enforcement agencies) should proffer the evidence for in camera review to the district court, (2) the classified document should be made part of the (sealed) record, and (3) the district court should then inform the parties whether or not it relied on the classified information in rendering its decision. Such a procedure would eliminate any confusion regarding the propriety of the submission. However, we also cannot conclude that Mr. Bassiouni was prejudiced because this procedure was not followed in his case. As noted above, Mr. Bassiouni had the opportunity in the district court to raise arguments against the FBI's submission. Mr. Bassiouni does not claim that he would have had a greater right of access to the Confidential Declaration should the district court have considered it at an earlier stage in the proceedings. Indeed, in the present case, the same result would have obtained if the FBI formally had proffered the Classified Declaration for in camera review, but the court had chosen not to inspect or to rely upon the information contained therein. Consequently, Mr. Bassiouni has not suffered any injury as a result of our consideration, as opposed to the district court's consideration, of the confidential declaration.

Finally, we note that confidential declarations may play an important role in safeguarding the rights of individuals—such as Mr. Bassiouni—whose files are being maintained for law

(Cont'd)

Appendix A

1.

Focusing on the district court's rationale for denying his § 552a(e)(7) claim, Mr. Bassiouni first argues that the Bureau may be held liable for its alleged violation of § 552a(e)(7) (and failing to cure that violation through the amendment process), pursuant to § 552a(g)(1)(A).

Mr. Bassiouni brought this action under the civil remedy provision of § 552a(g)(1)(A). By its terms, § 552a(g)(1)(A) provides a remedy only when an agency "makes a determination under [§ 552a(d)(3)] not to amend an individual's record . . . or fails to make such review in conformity with that subsection."

The FBI has exempted its Central Records System from the § 552a(d) amendment process, and those files are not subject to the amendment process of subsection (d). Because the FBI's Central Records System is not subject to the subsection (d) amendment process, the FBI cannot be held liable under (g)(1)(A) for failure to comply with that process. Mr. Bassiouni therefore has no avenue for relief under

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(Cont'd)

enforcement purposes. District courts need not rely on agencies' unsubstantiated assertions of a law enforcement purpose for collecting information or maintaining files; in camera review of confidential declarations provides additional evidence according to which a district court may judge the assertion of law enforcement necessity. Confidential declarations, therefore, advance the purpose of the Privacy Act by providing a necessary check on the activities of law enforcement agencies, while not jeopardizing their investigative efforts.

§ 552a(g)(1)(A). *See Doe v. FBI*, 936 F.2d 1346, 1351-53 (D.C.Cir.1991).

Mr. Bassiouni submits, however, that the plain language of § 552a(j) and (k) establish that Congress did not intend for an agency to exempt itself from the requirements of § 552a(e)(7). According to Mr. Bassiouni, "[t]he district court's interpretation, which leaves a plaintiff with no ability to subject the propriety of the agency's maintenance of protected First Amendment information to judicial scrutiny other than to pursue a rarely viable damage action, flies in the face of the object of the Act. . . ." Appellant's Br. at 20. In other words, according to Mr. Bassiouni, the de facto result of an agency exempting its records from subsection (d) is that it also exempts itself from the restrictions of subsection (e)(7).

We cannot accept this argument. Avenues of redress remain open to an individual whose records are maintained in violation of (e)(7), apart from those provided by the § 552a(d) amendment process and § 552a(g)(1)(A) review of that process. An individual has a cause of action under § 552a(g)(1)(D) when an agency "fails to comply with any other provisions of this section," provided that the individual demonstrates that the records' maintenance has an adverse effect on him.

Furthermore, we do not believe that requiring a plaintiff to plead an adverse effect in order to pursue a federal cause of action is tantamount to depriving the plaintiff of any remedy or is inconsistent with congressional intent. A regime in which the FBI is required to comply with (e)(7), but in

which private individuals may have a remedy only when the FBI's action has an adverse effect on them, accounts for Congress' dual concerns of protecting First Amendment rights and protecting national security.

2.

Mr. Bassiouni also maintains that, even if he cannot proceed on the alleged (e)(7) violation by way of subsection (g), "expungement is a well-recognized remedy for violations of subsection (e)(7)." Appellant's Br. at 23. However, we need not reach the question of whether expungement is a proper remedy because, as demonstrated below, we believe that the FBI's maintenance of Mr. Bassiouni's records in this case complies with the requirements of § 552a(e)(7).

As we have noted earlier, "law enforcement activity" is not defined in the statute. Similarly, courts that have addressed the applicability of the "law enforcement activity" language of § 552a(e)(7) have not found the need to define the term with precision. For instance, in *Patterson v. Federal Bureau of Investigation*, 893 F.2d 595, 603 (3d Cir.1990), the court held that a defendant agency invoking the protection for law enforcement activity contained in subsection (e)(7) "must demonstrate that its records on an individual's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the agency." The Sixth Circuit in *Jabara v. Webster*, 691 F.2d 272, 279-80 (6th Cir.1982), rejected the formulation for the (e)(7) exception employed by the district court in that case: "We agree . . . that the district court's construction of the exemption in the statute, limiting it to investigation of past, present or future criminal activity, is too narrow." *Id.* at 280.

Like our sister circuits, we do not believe that the circumstances presented to us here require us to determine the precise limits of the term "law enforcement activity." In this case, the Bureau, through Special Agent Krupkowski's declaration, identifies the ways in which Mr. Bassiouni's file is related to its law enforcement activities. First, the FBI notes its ongoing investigations into the threats posed by terrorist groups, specifically those originating in the Middle East. According to the declaration, "the FBI has amended its investigative priorities, naming as its number one priority to 'protect the United States from terrorist attack.'" R.22, Ex.1 ¶ 9. Because of the nature of these investigative activities, and because of the breadth of Mr. Bassiouni's contacts with the Middle East, the FBI anticipates that it will continue to receive information about Mr. Bassiouni. *Id.*, ¶ 10. The Bureau's file on Mr. Bassiouni will provide context for evaluating that new information.

Perhaps more importantly, the public Krupkowski Declaration states that the records are important for evaluating the continued reliability of its intelligence sources. The Declaration explains that the process of verifying source information, and therefore determining whether a source is reliable, takes place over "years, even decades." *Id.*, Ex.1 ¶ 11. "[S]ource information, therefore, remains relevant as long as the same source is used." *Id.*

We believe that the purposes identified by the Bureau fall within "authorized law enforcement activity" conducted by the FBI. We note at the outset that the realm of national security belongs to the executive branch, and we owe considerable deference to that branch's assessment in matters

of national security. *See Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 927-28 (D.C.Cir.2003). Furthermore, although the Privacy Act certainly does not authorize collection and maintenance of information of private citizens on the "off-hand" chance that such information may someday be useful, it does not require law enforcement agencies to purge, on a continuous basis, properly collected information with respect to individuals that the agency has good reason to believe may be relevant on a continuing basis in the fulfillment of the agency's statutory responsibilities. The Privacy Act does not give any indication that Congress intended law enforcement agencies to begin from scratch with every investigation. Nor do we believe that Congress meant to deprive such agencies of the benefit of historical analysis.

Mr. Bassiouni, however, urges us to reject the proffered law enforcement justifications as inadequate. He maintains, first, that, in order to fall within the law enforcement exception of (e)(7) the FBI must be "*currently* involved in a law enforcement investigation of Plaintiff." Appellant's Br. at 31 (emphasis in original). However, as we have noted already, no court that has considered the meaning of law enforcement activity in (e)(7) has interpreted the term so narrowly. Indeed, this court suggested in *Becker* a broader conception of "law enforcement activity" than that proposed by Mr. Bassiouni. *See* 34 F.3d at 408 (acknowledging that, "[u]nder some circumstances, [future use] may be a legitimate justification for maintaining documents in a file for an extended period of time"). Furthermore, if Congress had meant law enforcement activity only to mean "current law enforcement investigation," we believe Congress would have

chosen more restrictive language. It certainly did so with respect to other subsections of the Privacy Act. *See, e.g.*, 5 U.S.C. § 552a(j)(2) (speaking of "information compiled for the purpose of a criminal investigation"). We believe that Congress anticipated that, in the fulfillment of its responsibilities, an agency must maintain information that it can reasonably demonstrate will be pertinent in its efforts to evaluate the significance of future situations.

Mr. Bassiouni additionally submits that, even if the materials in his file are relevant to some law enforcement purpose, they should not be maintained in a file identifying him by name, but, instead, in a general file. He believes that our decision in *Becker*, 34 F.3d at 409, endorses this distinction. We do not believe that *Becker* supports Mr. Bassiouni's contention. In *Becker*, this court examined the material contained in the Beckers' file, which "consist[ed] of newspaper articles dating from the middle to late 1980s, *with no reference* to the Beckers." *Id.* (emphasis added). Furthermore, although the IRS asserted that it may maintain the materials "for possible future uses," it did not "elaborate on how this material would be helpful." *Id.* Here, by contrast, the materials contained in Mr. Bassiouni's file actually refer to Mr. Bassiouni and recount his activities. Additionally, the FBI has articulated a law enforcement purpose for maintaining the material in a file that identifies Mr. Bassiouni by name. Thus, we do not believe that *Becker* supports the position urged by Mr. Bassiouni.

As noted above, the Privacy Act was designed to protect citizens from Government intrusion. However, language specifically was added to the Act to ensure that it did not

stifle "activities which are properly within the scope of legitimate law enforcement." 120 Cong. Rec. 36,650 (1974) (statement of Rep. Ichord). The purposes for maintaining Mr. Bassiouni's file articulated by the FBI are properly within the scope of its law enforcement activity. Consequently, we do not believe that the FBI has run afoul of subsection (e)(7) by maintaining Mr. Bassiouni's file.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED SEPTEMBER 10, 2004

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 8918

MAHMOUD CHERIF BASSIOUNI
a/k/a M. CHERIF BASSIOUNI

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Mahmoud Cherif Bassiouni ("Bassiouni"), brings this action for declaratory and injunctive relief under the Privacy Act, 5 U.S.C. § 552a(g)(1)(A), seeking an injunction ordering the Federal Bureau of Investigation ("FBI") to amend FBI records pertaining to him. Bassiouni alleges that the records are not "accurate, relevant, timely, and complete" as required by § 552a(e)(5) and that the records describe Bassiouni's First Amendment activities, in violation of § 552a(e)(7). Before the court are cross-motions for

summary judgment. For the reasons stated below, Bassiouni's motion for summary judgment is denied, and the FBI's motion for summary judgment is granted.

SUMMARY JUDGMENT STANDARDS

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). To determine whether any genuine fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed R. Civ. P. 56(c) Advisory Committee's notes. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir.2000). Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir.2000), the court must construe all facts in a light most favorable to the non-moving party as well as view all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Appendix B

FACTS

Bassiouni, an American citizen, is a former president of the Association for Arab-American University Graduates ("AAAUG") and a former president of the Mid-America Arab Chamber of Commerce, Inc. He is currently president of DePaul University's International Human Rights Law Institute, the International Institute of Higher Studies in Siracusa, Italy, and the International Association of Penal Law in Paris, France. In 1992, he was appointed a member, and later chairman, of the United Nations ("U.N.") Commission to Investigate International Humanitarian Law Violations in the Former Yugoslavia. From 1995- 1998, he was elected vice-chairman of the U.N. General Assembly's Committee for the Establishment of an International Criminal Court and, in 1998, he was elected to the Drafting Committee of the U.N. Diplomatic Conference on the Establishment of the International Criminal Court. *See* http:// www.law.depaul.edu/institutes_centeres/ihrli/.

By letter dated November 22, 1999, Bassiouni wrote to the FBI seeking access to records in possession of the FBI pertaining to him. By letter dated March 23, 2001, the FBI released forty nine pages of records, with redactions, including a transmittal cover letter dated April 8, 1983, and five memoranda and appendices dated March 27, 1970, January 9, 1974, July 9, 1974, January 23, 1975, and August 5, 1975, respectively. The records contain references to the following organizations, along with descriptions of their leaders and the characteristics of the organizations: (1) Organization of Arab Students; (2) Al Fatah; (3) Popular Front for the Liberation of Palestine ("PFLP"); (4) Palestine

Liberation Organization ("PLO"); (5) Arab American Congress for Palestine ("AACP"); (6) Arab Scientists Association in the United States; (7) Arab American Defense Committee, (8) Palestine Liberation Forces; (9) American Congress for Palestine; (10) Palestine Liberation Army; and (11) the United Holy Land Fund. The records describe a number of these organizations as being "terrorist" in nature, and one of the groups is currently named on the United States Department of State's List of Designated Foreign Terrorist Organizations ("FTOs"). *See* Office of Counterterrorism, U.S. Dep't of State, Designated FTOs (AUGUST 12, 2004) (listing the PFLP), http:// www.state.gov/s/ct/rls/fs/2004/35167.htm. None of the records state FBI conclusions that Bassiouni is or was a member of any of these organizations, and Bassiouni has stated by affidavit that he is not now nor has he ever been a member of any of these organizations. Bassiouni has also stated that none of these organizations were a part of the AAAUG.

The records also contain a memorandum referring to a speech Bassiouni purportedly gave at a banquet sponsored by the AACP on November 25, 1973. The memorandum summarizes several points Bassiouni allegedly made during the speech, but does not contain the speech in its entirety nor any direct quotations or context for the remarks.

By letter dated April 23, 2001, Bassiouni wrote to the FBI seeking amendment of the records on the grounds that they were not accurate; they directly or indirectly described the exercise of Bassiouni's First Amendment activities; their continued maintenance was not relevant to a legitimate statutory purpose; they were not timely; and portions of the

record were not complete. By letter dated February 6, 2002, the FBI issued a denial of Bassiouni's request for amendment, contending that the "records maintained in the FBI central records system are exempt" from the amendment provisions of the Privacy Act. Although the letter noted that the FBI nonetheless would consider the amendments offered by Bassiouni, the letter rejected Bassiouni's amendment request because "it is our judgment that the information is a reasonably accurate, relevant, and timely account of the results of our investigation and is completely relevant to the investigative purpose for which it was collected."

On March 4, 2002, Bassiouni filed a written appeal from this denial of amendment. Among other things, Bassiouni stated that the inclusion in his file of references to organizations such as the PFLP and the PLO "constitutes an unconstitutional effort to implicitly link me to these groups and to thereby damage my reputation solely through guilt by association." On or about September 25, 2002, Bassiouni received an undated letter from the FBI denying Bassiouni's appeal. The letter informed Bassiouni that he could send a "Statement of Disagreement" to the FBI to be included in the file. There is no indication that Bassiouni ever did so. The FBI continues to maintain the records in its Central Records System ("CRS"). (Garrity Decl. ¶ 4.)

Defendants have submitted an affidavit from James M. Krupkowski ("Krupkowski"), a Supervisory Special Agent and the Chief Division Counsel of the FBI Chicago Field Office, explaining, to the extent possible on the public record, why the records pertaining to Bassiouni were collected and why the FBI continues to maintain the records. Krupkowski

states that the records were collected in the early 1970s, when "the stakes were high in the FBI's investigations into Middle East terrorist threats." The investigative relevance of the information regarding Bassiouni is classified, but in 1975 "an investigative conclusion was reached that Mr. Bassiouni was not a member of any terrorist organization." Krupkowski states that "there were a few brief investigative efforts" regarding Bassiouni subsequent to 1975 "because he continued to come to our attention," but "given the context provided by our earlier investigative records, quick conclusions were reached that he was not a member of a terrorist organization and not involved in terrorist activity."

However, Krupkowski states that information regarding Bassiouni continues to be "relevant to, and necessary for, current investigative interests." Though the specific law enforcement interests for maintaining the records are classified, Krupkowski provides the following general explanation.

First, the FBI has amended its investigative priorities, naming as its number one priority to "protect the United States from terrorist attack." Investigation into the criminal activities of Middle Eastern terrorist organizations remains a vital element of the FBI's counterterrorism efforts.

Second, Krupkowski states, "given the nature, breadth and depth of Mr. Bassiouni's contacts and activities, I believe it is extremely likely that FBI Chicago will continue to receive information regarding Mr. Bassiouni." If the FBI receives such information, Bassiouni's current records will be necessary to provide a context in which to evaluate the newly

received information. "Such information can be properly assessed only in the context of the information we currently possess."

Third, the records in question "remain important for evaluating source reliability." Krupkowski explains,

> When the FBI receives source information, it often is not capable of verifying the validity of that information at the time. The FBI tries to verify that information over time, such as by comparing it to future information or events. It also continually uses all information at its disposal to evaluate the reliability of confidential sources. That is, if Source A provides information that turns out to be inaccurate or false, as proven by later events or information from other sources, then that reflects on the reliability of Source A. We would have to evaluate our continued operation of Source A, and also re-evaluate any investigative conclusions/actions taken based on information from Source A, even in other cases. Thus, it is critically important for the FBI to maintain source information over a long period of time.

Because the FBI may rely on the same sources for years, source information "remains relevant as long as the same source is used."

Finally, Krupkowski states that the records are important for their "historic and accountability purposes." Krupowski explains that if there were a terrorist attack "even remotely

related" to the individuals or groups with which Bassiouni has had contact, "there will be an intense interest in what the FBI knew and when it knew it. Destruction or amendment of the records would impede such an inquiry."

DISCUSSION

The Privacy Act is primarily designed to provide individuals with more control over the gathering, dissemination, and accuracy of information about themselves contained in government files. *See Vymetalik v. Federal Bureau of Investigation*, 785 F.2d 1090, 1092 (D.C.Cir.1986). To accomplish this purpose, the Act requires each government agency to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). Furthermore, the Act prohibits government agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity." *Id.* § 552a(e)(7).

Bassiouni alleges that the records at issue are not "accurate, relevant, timely, and complete" as required by § 552a(e)(5) and that the records describe Bassiouni's First Amendment activities, in violation of § 552a(e)(7). However, violations of (e)(5) and (e)(7) do not, in themselves, give rise to a cause of action. Subsections (e)(5) and (e)(7) simply set forth standards to which records must conform. *See* U.S. Dep't of Justice, Freedom of Information Act Guide &

Privacy Act Overview 858 (May 2002 ed.). Bassiouni's cause of action arises solely under § 552a(g)(1)(A). *See Bassiouni v. FBI*, 2003 WL 22227189 (N.D.Ill. Sept.26, 2003). Subsection (g)(1)(A) provides that whenever an agency "makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request . . . the individual may bring a civil action against the agency." In other words, it is the FBI's refusal to amend the records under subsection (d)(3), rather than its alleged violations of (e)(5) and (e)(7), that give rise to this cause of action.

The Privacy Act provides that the head of an agency may promulgate rules to exempt any system of records from the Act's subsection (d) amendment procedures if, *inter alia*, the system of records contains "investigatory material compiled for law enforcement purposes." *Id.* § 552a(k)(2). The FBI has promulgated regulations that specifically exempt records maintained in its CRS from the amendment provisions of subsection (d) to the extent that the information in the system is subject to exemption pursuant to subsection (k). *See* 16 C.F.R. § 16.96(a)(1). The regulation explains that records maintained in the CRS must be exempt from subsection (d)

> because to require the FBI to amend information thought to be incorrect, irrelevant or untimely, because of the nature of the information collected and the essential length of time it is maintained, would create an impossible administrative burden by forcing the agency to continuously retrograde its investigation attempting to resolve questions of accuracy, etc.

Id. § 16.96(b)(2)(iii).

Because the records at issue are maintained in the CRS, they are exempt from the amendment procedures of subsection (d), and thus from an amendment suit under (g)(1)(A), if they were "compiled for law enforcement purposes." The FBI argues that the Krupkowski Declaration "explains that the records consist of investigatory material compiled for law enforcement purposes." (Def. Mot. for Summ. J., at 8, citing Krupkowski Decl. ¶¶ 4 & 6.) Bassiouni argues that the Krupkowski Declaration does not confirm that the records were "compiled for law enforcement purposes," but states only that the records "are being maintained as a necessary function of lawful investigations related to important FBI investigative interests." (Pl. Resp., at 10.) Bassiouni's argument is unconvincing. Krupowski's omission of the "magic words" contained in the statute is irrelevant given the details he provides. Krupkowski explains that "in 1975 an investigative conclusion was reached that Mr. Bassiouni himself was not a member of any terrorist organization." (Krupkowski Decl. ¶ 6.) This conclusion clearly implies that the material in the records, upon which this conclusion was based, was "compiled for law enforcement purposes"—namely, determining if Bassiouni was a member of a terrorist organization. Thus, the records are exempt from subsection (d)'s amendment requirements.

Bassiouni argues that even if the records are exempt from subsection (d), they are not exempt from the standards set forth in (e)(5). Bassiouni points out, correctly, that subsection (k) of the Privacy Act does not permit an agency to exempt its records from subsection (e)(5). *See* 5 U.S.C. § 552a(k) ("The head of an agency may promulgate regulations . . . to exempt any system of records from subsections (c)(3), (d),

(e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is— . . . (2) investigatory material compiled for law enforcement purposes."). However, it does not follow that an agency can "simply bypass the statutory prohibition on exempting law enforcement records from subsection (e)(5) by exempting itself from subsection (d)." (Pl. Resp., at 12.) An agency that exempts itself from subsection (d) still may be sued for damages by an individual for (e)(5) violations if the agency makes any "determination . . . adverse to the individual" on the basis of such records (giving rise to an action for damages under § 552a(g)(1)(C)) or if its failure to comply with (e)(5) has an "adverse effect" on the individual (giving rise to an action for damages under § 552a(g)(1)(D)).[1] *See Hidalgo v. Bureau of Prisons*, 2002 WL 1997999 (D.C.Cir. Aug 29, 2002) (per curium) ("Although [the records at issue] are not exempt from 5 U.S.C. § 552a(e)(5)'s accuracy requirements, the Privacy Act permits only suits for damages for violation of this provision, and appellant's complaint seeks only injunctive relief.").

---

1. Though neither party addresses the issue, the same analysis applies to the FBI's alleged violations of subsection (e)(7).

Appendix B

CONCLUSION

Because the records at issue are exempt from § 552a(d) amendment procedures, Bassiouni's claim under § 552a(g)(1)(A) fails. Bassiouni has failed to establish that this action is viable under any other provision of the Privacy Act. Thus, Bassiouni's motion for summary judgment [# 19] is denied, and the FBI's motion for summary judgment [# 22] is granted. The clerk is instructed to enter judgment in favor of the defendant. Case is terminated.

ENTER: s/ Joan Humphrey Lefkow
JOAN HUMPHREY LEFKOW
United States District Judge

Dated: September 10, 2004

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 27, 2006

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Dated April 27, 2006

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 04-3888

MAHMOUD C. BASSIOUNI, also known as
CHERIF BASSIOUNI,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

Appendix C

ORDER

Upon consideration of the Plaintiff-Appellant's petition for rehearing en banc, no judge in active service[1] has called for a vote thereon. Construing the petition as a petition for rehearing, the judges of the original panel have voted to deny the petition.

Accordingly, rehearing and rehearing en banc are denied.

---

1. The Honorable Joel M. Flaum, *Chief Judge*, The Honorable Ilana Diamond Rovner, *Circuit Judge*, and The Honorable Diane P. Wood, *Circuit Judge*, took no part in the consideration of this matter.

Supreme Court, U.S.
FILED
OCT 27 2006
OFFICE OF THE CLERK

No. 06-142

In the Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI,
AKA M. CHERIF BASSIOUNI, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

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QUESTIONS PRESENTED

1. Whether the maintenance of records pertaining to Middle Eastern organizations, including terrorist organizations, and an individual's contacts with them is "pertinent to and within the scope of an authorized law enforcement activity," within the meaning of the Privacy Act, 5 U.S.C. 552a(e)(7).

2. Whether the court of appeals erred in reviewing a classified declaration, where that declaration was proffered to the district court but that court chose not to examine it.

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In the Supreme Court of the United States

No. 06-142

MAHMOUD CHERIF BASSIOUNI,
AKA M. CHERIF BASSIOUNI, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 436 F.3d 712. The decision of the district court (Pet. App. 30a-41a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 30, 2006. A petition for rehearing was denied on April 27, 2006 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, governs federal agencies' collection, maintenance, use, and dissemination of information pertaining to individuals. See *Doe* v.

Chao, 540 U.S. 614, 618 (2004). The Act allows an individual to gain access to certain records about himself and request that the information in such records be amended if it is not "accurate, relevant, timely, or complete." 5 U.S.C. 552a(d)(1) and (2)(B)(i). As relevant here, the statute provides that a federal agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment * * * unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7).

The Privacy Act also provides individuals with "various sorts of civil relief" if the Government fails to comply with a statutory requirement. See *Doe*, 540 U.S. at 618. In many cases, an individual may request that an agency amend the records pertaining to him. See 5 U.S.C. 552a(d)(2)(B)(i) and (g)(1)(A). However, the FBI has exempted its records "compiled for law enforcement purposes" from those amendment provisions, 5 U.S.C. 552a(k)(2). See 28 C.F.R. 16.96(a)(1). An individual also may bring suit for money damages, alleging that an agency's failure to comply with any statutory requirement was "intentional and willful" and resulted in an "adverse effect" on the individual. See 5 U.S.C. 552a(g)(1)(D) and (4)(A).

2. In November 1999, petitioner requested from the FBI, pursuant to the Privacy Act, "any records concerning himself or his activities that were in [its] possession." Pet. App. 13a. In response, the agency released 49 pages of redacted material. *Ibid.* Those records revealed that, during the 1970s, petitioner had contact with various influential officials in Middle Eastern affairs, including Yasir Arafat, and that petitioner had sent letters to prominent Arab-Americans that urged an end to attacks on Israeli facilities in the United States.

See Complaint, Exh. A. The records also referred to a number of terrorist groups, including the Popular Front for the Liberation of Palestine, which the State Department has designated a foreign terrorist organization. Pet. App. 13a, 32a-33a. None of the records, however, concluded that petitioner was a member of a terrorist organization. *Id.* at 13a.

Petitioner subsequently requested that the FBI amend a number of the records. Pet. App. 13a, 33a. The FBI denied his request, *id.* at 13a-14a, but informed petitioner that he could file a "Statement of Disagreement" with the agency, setting forth the portions of the record to which he objected, *id.* at 14a. Petitioner did not file a Statement of Disagreement. *Ibid.*

Petitioner instead filed suit, alleging that the FBI violated the Privacy Act by maintaining records describing his First Amendment activities, and seeking to compel the FBI to expunge those records. Pet. App. 14a. The FBI responded that the records at issue were properly maintained because they are "pertinent to and within the scope of an authorized law enforcement activity" and, in particular, its ongoing investigation of terror threats in the Middle East. *Id.* at 16a-17a.

In support of its position, the FBI submitted the declaration of James M. Krupkowski, the Supervisory Special Agent and Chief Division Counsel of the FBI Chicago Field Office. See Pet. App. 17a, 34a. That declaration explained that petitioner's records were relevant to "current 'investigative interests'" because: (i) "investigation of terrorism is the FBI's top priority"; (ii) due to petitioner's contacts, "the FBI will continue to receive information about [him] and will need the records to provide [a] context with which to evaluate that new information"; and (iii) the "records are important for eval-

uating the credibility and veracity of the FBI's sources." *Id.* at 17a. The declaration further stated that "the exact relevance of [petitioner's] records [is] classified." *Ibid.* The FBI offered the district court a classified declaration by Mr. Krupkowski, which explained in more detail the agency's initial and continuing need for the records pertaining to petitioner. See *ibid.* Petitioner did not object to the district court's possible consideration of the classified material. *Id.* at 21a n.7. The district court, however, chose not to review the classified declaration. See *id.* at 17a, 20a-21a n.7.

The district court granted summary judgment for the FBI. See Pet. App. 30a-41a. The court held that the records were "compiled for law enforcement purposes," and were therefore exempt from the amendment procedures of the Privacy Act. *Id.* at 39a. The court further concluded that, if the FBI had violated Section 552a(e)(7), petitioner's remedy would be a suit for damages. See *id.* at 40a & n.1.

3. Petitioner appealed. Following oral argument, the court of appeals directed the FBI to make the classified declaration available to each member of the panel. See Pet. App. 20a n.7.

The court of appeals affirmed the district court's judgment. Pet. App. 1a-29a. The court held that the FBI did not violate Section 552a(e)(7) of the Privacy Act, because the records pertaining to petitioner's First Amendment activities were "pertinent to and within the scope of an authorized law enforcement activity"—that is, the agency's ongoing investigation of terror threats in the Middle East. *Id.* at 20a, 25a-29a. In particular, the court found that the records "are important for evaluating the continued reliability of [the FBI's] intelligence sources," and that they provide a "context for

evaluating th[e] new information" that is expected to arrive due to the "breadth of [petitioner]'s contacts with the Middle East." *Id.* at 26a.

The court rejected petitioner's contention that the FBI could retain the records at issue only if it was "currently involved in a law enforcement investigation of [petitioner]." Pet. App. 27a (emphasis omitted). The court observed that "no court that has considered the meaning of law enforcement activity in (e)(7) has interpreted the term so narrowly." *Ibid.* The court further concluded that the Privacy Act does not require law enforcement agencies "to purge, on a continuous basis, properly collected information with respect to individuals that the agency has good reason to believe may be relevant on a continuing basis in the fulfillment of the agency's statutory responsibilities." *Ibid.* "The Privacy Act," the court reasoned, "does not give any indication that Congress intended law enforcement agencies to begin from scratch with every investigation." *Ibid.*

The court also held that, even had the FBI violated Section 552a(e)(7), petitioner could not compel the amendment of his records, because those files were exempt from the amendment process. See Pet. App. 23a-25a. The court noted that, if the FBI violated the statute, petitioner could instead bring an action for damages. See *id.* at 24a.

Finally, the court rejected petitioner's argument that it was barred from considering the classified declaration. See Pet. App. 20a-23a n.7. The court noted that petitioner "had the opportunity in the district court to raise arguments against the FBI's submission." See *id.* at 21a-22a n.7. The court further explained that, even if the classified material had been examined by the district court, petitioner would have no greater claim to see the

classified material, so the court of appeals' review of the document did not prejudice petitioner. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. The Privacy Act generally prohibits agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment," unless, *inter alia*, the records are "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7). Petitioner seeks (Pet. 5-20) this Court's review of an alleged conflict in the circuits concerning the scope of that "law enforcement activity" exception. There is no such conflict.

While petitioner identifies (Pet. 7-19) a handful of appellate cases that generally describe the content of the "law enforcement activity" exception, that discussion demonstrates nothing more than that courts sometimes employ different language in describing what constitutes a law enforcement activity. See *Jabara* v. *Webster*, 691 F.2d 272, 280 (6th Cir. 1982) (records must be "relevant to an authorized criminal investigation or to an authorized intelligence or administrative one"), cert. denied, 464 U.S. 863 (1983); *Clarkson* v. *IRS*, 678 F.2d 1368, 1375 (11th Cir. 1982) (information should be "[]connected to an[] investigation of past, present or anticipated violations of the statutes which [the agency] is authorized to enforce").

Other courts have eschewed any comprehensive definition, and have addressed the exemption's application on a case-by-case basis. See *Wabun-Inini* v. *Sessions*,

900 F.2d 1234, 1246 (8th Cir. 1990) (finding law enforcement exception applicable to FBI investigation, but otherwise "delay[ing] a closer scrutiny of the law enforcement exemption until the issue is more carefully framed and necessary to the decision"); *Patterson* v. *FBI*, 893 F.2d 595 (3d Cir.) (case-specific application of exemption), cert. denied, 498 U.S. 812 (1990); *MacPherson* v. *IRS*, 803 F.2d 479, 484 (9th Cir. 1986) ("declin[ing] to fashion a hard and fast standard for determining whether a record * * * is pertinent to and within the scope of an authorized law enforcement activity," and instead "elect[ing] to consider the factors for and against the maintenance of such records * * * on an individual, case-by-case basis") (internal quotation marks omitted).

Petitioner fails to demonstrate, however, that those courts' slightly different articulations or approaches have resulted in any material distinction in outcomes or, more particularly, would have resulted in a different ruling in this case. And the fact that there have been less than a dozen court of appeals cases addressing the exception over the last quarter century, and even then at such a broad level of generality, completely undermines petitioner's claim (Pet. 5) of "utter chaos" in circuit law.

Petitioner's reliance on *J. Roderick MacArthur Foundation* v. *FBI*, 102 F.3d 600 (D.C. Cir. 1996), cert. denied, 522 U.S. 913 (1997), and *Becker* v. *IRS*, 34 F.3d 398 (7th Cir. 1994), is even further misplaced. Those cases addressed whether the exemption applies to records that were originally collected as part of a "law enforcement activity," but that are not pertinent to any *current* law enforcement activity. See *MacArthur Found.*, 102 F.3d at 605 ("The Act does not require an

agency to expunge records when they are no longer pertinent to a current law enforcement activity."); *Becker*, 34 F.3d at 409 ("any thought that [the material] could be helpful in future enforcement activity concerning the Beckers is untenable").

Those decisions have no relevance to this case because the court expressly found a current and ongoing law enforcement role for petitioner's records based on their relevance to the FBI's continuing investigation of terror threats in the Middle East and the credibility of intelligence sources on such matters. Pet. App. 26a. The courts of appeals have consistently held that such law-enforcement intelligence purposes fall within the Section 552a(e)(7) exception. See, *e.g.*, *Patterson*, 893 F.2d at 600-601, 603 (protecting national security); *Nagel* v. *United States Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 n.3 (D.C. Cir. 1984) ("authorized intelligence" activities) (quoting *Jabara*, 691 F.2d at 280); cf. *Clarkson*, 678 F.2d at 1375 (records must be relevant to the "investigation of past, present or anticipated violations of the statutes which it is authorized to enforce").[1]

2. Petitioner also seeks (Pet. 20-23) this Court's review of the court of appeals' consideration of a classified declaration that was proffered to, but not considered by, the district court. That record-bound disagreement with the court of appeals' discretionary judgment does not merit this Court's review.

---

[1] Petitioner's suggestion (Pet. 11) of an internal conflict within the Seventh Circuit is both wrong, see Pet. App. 28a (distinguishing *Becker*); *id.* at 42a-43a (denying rehearing en banc), and beside the point, as this Court generally does not sit to harmonize intra-circuit conflicts.

Petitioner objects (Pet. 21-22) that the declaration was not part of the record. But the declaration was proffered in district court, see Pet. App. 17a, 20a-21a n.7, which made it effectively part of the record and provided petitioner full notice of the document's existence and the opportunity to object. See, *e.g.*, *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (relying on classified material that had been offered to, but not considered by, the district court), cert. denied, 540 U.S. 1218 (2004); *McClendon* v. *Indiana Sugars, Inc.*, 108 F.3d 789, 795 (7th Cir. 1997) (noting that material used on appeal should be first "proffered to the district court"); cf. *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("[T]he court has inherent authority to review classified material *ex parte*, *in camera* as part of its judicial review function."), cert. denied, 543 U.S. 1146 (2005). In any event, there is no indication in the court's opinion that it relied on the classified declaration or that the case would have come out differently had the declaration not been submitted. Absent substantial prejudice, there is no error for this Court to remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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IN THE

Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI
a/k/a M. CHERIF BASSIOUNI,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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Barry A. Miller, Sua Sponte *Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253 (2002) 4

Mahmoud Cherif Bassiouni a/k/a M. Cherif Bassiouni, Petitioner, pursuant to U.S. Supreme Court Rule 44(2), respectfully petitions this Court to reconsider its November 27, 2006, Order denying his petition for a writ of *certiorari* and to grant his petition for an adjudication on the merits or, alternatively, to vacate the opinion of the United States Court of Appeals for the Seventh Circuit, Case No. 04-3888, dated January 30, 2006, and remand the case for reconsideration following supplemental briefing and argument on the case-dispositive issue that the Seventh Circuit panel decided *sua sponte*.

REASON FOR GRANTING THE PETITION FOR REHEARING

REHEARING SHOULD BE GRANTED TO CLARIFY THIS COURT'S JURISPRUDENCE AND TO MAKE IT EXPLICIT THAT APPELLATE COURTS MAY NOT, CONSISTENT WITH PROCEDURAL DUE PROCESS, *SUA SPONTE* DECIDE A CASE-DISPOSITIVE ISSUE WITHOUT FIRST PERMITTING THE PARTIES TO FULLY BRIEF AND ARGUE THE ISSUE IN THE APPELLATE COURT. ALTERNATIVELY, THIS COURT SHOULD VACATE THE APPELLATE COURT'S DECISION AND REMAND THE CASE WITH INSTRUCTIONS THAT THE PANEL RECONSIDER ITS DECISION AFTER THE PARTIES ARE AFFORDED THE OPPORTUNITY TO SUBMIT SUPPLEMENTAL BRIEFS AND PRESENT ARGUMENT ON THE ISSUE AT BAR.

> "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."
>
> – *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

Relevant Factual Background

The instant case concerns a complaint for declaratory and injunctive relief filed by M. Cherif Bassiouni for amendment and expungement of highly prejudicial records being maintained in his personal Privacy Act file by the Federal Bureau of Investigation (FBI), which records describe the exercise of his First Amendment activities, in violation of 5 U.S.C. § 552a(e)(7) (2000). In particular, the FBI's records indicate that, in 1975, after conducting an investigation, the FBI concluded that Bassiouni "was not a member of any terrorist organization." Moreover, in its opinion, the Seventh Circuit panel admitted that "[n]one of the record memoranda concluded that Mr. Bassiouni was a member of a terrorist organization. Mr. Bassiouni denies any such membership, and the FBI concedes that it does not suspect him of ties to terrorist groups." Yet, the records in Bassiouni's FBI file contain references to and general descriptions of numerous organizations, a number of which are described as "terrorist" in nature, and one of which is currently named on the United States Department of State's List of Designated Foreign Terrorist Organizations. None of these descriptions, however, makes any reference to Bassiouni.

In support of its motion for summary judgment, the FBI submitted a public declaration of Supervisory Special Agent (SSA) James M. Krupkowski, in which he stated that, despite the agency's conclusion that "Mr. Bassiouni himself was not a member of any terrorist organization," it was likely that the FBI "will continue to receive information regarding Mr. Bassiouni" in the future. After both parties filed cross-motions for summary judgment, the district court entered judgment for the FBI (published at 2004 U.S. Dist. LEXIS 18515).

At oral argument on June 9, 2005, counsel for the FBI repeatedly asked the panel to consider *ex parte* a classified declaration of SSA Krupkowski, although such declaration was never submitted in the district court or considered by the district court judge in making her ruling, and was not contained in the record on appeal. Bassiouni's counsel objected at oral argument to the Court considering the classified declaration, as well as in a motion asking the Court to reconsider its subsequent directive ordering that the FBI produce the classified declaration for the first time on appeal.

On January 30, 2006, the Court of Appeals for the Seventh Circuit issued an opinion (published at 436 F.3d 712) affirming the decision of the district court, holding that it was not required to reach Bassiouni's request for expungement under subsection (e)(7) of the Privacy Act because, without "determin[ing] the precise limits of the term 'law enforcement activity,'" the Court "believe[s] that the purposes identified by the Bureau fall within 'authorized law enforcement activity' conducted by the FBI." Significantly, the Court confirmed that it considered the FBI's classified declaration *in camera* in rendering its decision. Furthermore, the Court admitted that, in considering the secret FBI declaration, it failed to "hold fast to . . . Federal Rule of Appellate Procedure 10," which requires that documents must be made part of the record in order to be considered on appeal.

The Seventh Circuit subsequently denied Bassiouni's request for rehearing *en banc* on April 27, 2006 (published at 2006 U.S. App. LEXIS 10807).

Legal Analysis

"The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). *See* U.S. CONST. amends. V, XIV. Accordingly,

> appellate courts should not render decisions that adversely impact the life, liberty, or property of a party without giving that party an opportunity to be heard on the issue that the court deems dispositive. Appellate courts do just that, however, when they render *sua sponte* decisions. Thus, these decisions are fundamentally inconsistent with the due process guarantees of the United States Constitution.

Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at* Sua Sponte *Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 263 (2002). *See* Barry A. Miller, Sua Sponte *Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1305 (2002) ("It is relatively easy to conclude that courts should give notice and an opportunity to be heard before deciding issues *sua sponte*; in most cases the costs are low and the benefits are high. Ordering supplemental briefing (or a similar procedure) meets the due process objection to *sua sponte* decisions . . . .").

This Court's decision in *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439 (1993), stands for the proposition that, although an appellate court may *raise* an issue *sua sponte*, "an appellate court abuses its judicial discretion" where it *sua sponte decides* an issue "without giving the parties an opportunity to address it." Milani & Smith, 69 TENN. L. REV. at 290. *See id.* at 287 (noting that *Independent Insurance* "suggests that *sua sponte* decision making is an abuse of judicial discretion").

At issue in *Independent Insurance* was whether 12 U.S.C. § 92, which permits national banks located in small communities to sell insurance to customers outside those communities, had been inadvertently repealed in 1918.

See Independent Insurance, 508 U.S. at 441. Although the district court noted that the statute may have been repealed, the respondents had not asked the district court to rule that section 92 no longer existed, and they took the same position before the Court of Appeals for the District of Columbia Circuit, noting in their brief that all the relevant parties had assumed the provision's validity. *Id.* at 444. Nevertheless, the Court of Appeals directed the parties to be prepared to address the status of section 92 at oral argument, and, after oral argument (at which respondents' counsel declined to argue that the provision was no longer in force), it ordered supplemental briefing on the issue. *Id.* In their supplemental brief, respondents urged the reviewing court to decide the question but took no position on whether section 92 was valid law. *Id.* The Court of Appeals, however, did address the issue and held that Congress had repealed section 92 in 1918. *Id.* at 444-45.

Before reviewing the merits of the appellate court's decision on section 92's continued validity, this Court first addressed the petitioner's argument that the Court of Appeals had no authority to consider the issue because the respondents failed to challenge the law's validity throughout the proceedings and, second, answered the question of whether the appellate court abused its discretion in *sua sponte* deciding the issue. *Id.* at 445. As to the first inquiry, this Court held that "[i]n addressing the status of section 92, the Court of Appeals did not stray beyond its constitutional or prudential boundaries." *Independent Insurance*, 508 U.S. at 447. With respect to the second question, the Court held that "*[a]fter giving the parties ample opportunity to address the issue*, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law" and thus ruled that the appellate court did not abuse its discretion. *Id.* at 448 (emphasis added).

In highlighting that the appellate court gave the parties "ample opportunity to address the issue," the Court's language "suggests that this fact led the Court to conclude that there was no abuse of judicial discretion" and "suggests that the result would have been different had the court of appeals not given the parties 'ample opportunity' to address the *sua sponte* issue." Milani & Smith, 69 TENN. L. REV. at 289-90. Accordingly, *Independent Insurance* stands for the principle that a reviewing court cannot *sua sponte* decide an outcome-determinative issue without giving the parties a meaningful opportunity to address it. *See id.* at 290.

More recently, in *Trest v. Cain*, 522 U.S. 87 (1997), this Court again strongly suggested that, before *sua sponte* deciding an issue, the appellate court should provide the parties with an opportunity to present argument. More specifically, in *Trest*, the State of Louisiana, in a habeas corpus case, asked this Court "to go beyond the question presented and hold that the law permitted (though it did not require) the Fifth Circuit to raise the procedural default *sua sponte*." *Trest*, 522 U.S. at 90. This Court, however, declined to do so. *Id.* at 90-91. Yet, the Court noted that had the Fifth Circuit "not decided the procedural default question without giving the parties an opportunity for argument," the parties might have considered such matters, and the Court of Appeals could have considered their relevance or their answers. *Id.* at 92. This Court then stated that "[w]e do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home.[']" *Id.*

Furthermore, where, as in the instant matter, a reviewing court "decides a case on an issue raised *sua sponte* without input from the parties, it should grant motions for rehearing filed by the losing party as matter of right." Milani & Smith, 69 TENN. L. REV. at 304. *See id.* ("If a court fails to grant a

rehearing in these situations, the end result is a violation of due process because there was no opportunity to be heard before or after judgment."). *See Adoption of Alexander S. v. Tudor G.*, 750 P.2d 778, 782-83 (Cal. 1988) (reversing *sua sponte* decision by the court of appeal where the appellate court refused to permit a request to submit supplemental briefs on a point raised for the first time at oral argument).

In this regard, this Court has a long history of requesting supplemental briefing and argument after raising an issue *sua sponte*. For example, in the course of the Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court asked for two sets of supplemental briefs and oral arguments. After the initial argument in the case, the Court asked the parties to file briefs and present argument on five different major points. *See Brown v. Board of Education*, 345 U.S. 972, 972-73 (1953). In addition, the Court subsequently requested briefing and argument from the U.S. Attorney General, as well as from the Attorneys General of the states requiring or permitting segregation in public education. *See Brown*, 347 U.S. at 495-96. *See also Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000) (inviting professor as *amicus curiae* to argue in support of the constitutionality of 18 U.S.C. § 3501, where no party in the underlying litigation argued in favor of the provision).

In the present case, the Seventh Circuit *sua sponte* decided the outcome of Bassiouni's case based upon *in camera* consideration of a classified FBI declaration that was submitted for the first time after oral argument, was never filed in the district court, was not relied upon by the district court judge, was not made part of the record on appeal, and regarding which the parties were never given the opportunity to file merits briefs or orally argue. As far as Bassiouni is aware, such a procedure is unprecedented in the annals of American jurisprudence. The extraordinarily egregious violation of procedural due process in this case provides this

Court with the perfect opportunity to clarify its holdings in *Independent Insurance* and *Trest*, and to make explicit what it has previously strongly suggested, *viz.*, that an appeliate court violates procedural due process where it *sua sponte* decides a case-dispositive issue without first affording the parties the opportunity to brief and argue the issue. If this Court declines to reconsider Bassiouni's petition for writ of *certiorari* on the merits on this ground, then, at a minimum, the Court should vacate the Seventh Circuit's decision and remand the case for reconsideration on this issue following supplemental briefing and argument.

Accordingly, this Court should grant Bassiouni's petition for rehearing.

CONCLUSION

For the reasons set forth above, the Petitioner, M. Cherif Bassiouni, respectfully prays that this Court grant his petition for rehearing and that a writ of *certiorari* issue to review the decision of the Seventh Circuit Court of Appeals. Alternatively, Bassiouni prays that this Court vacate the decision of the Seventh Circuit and remand the case for reconsideration following the opportunity for supplemental briefing and argument.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.